Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH DUFFEY, DIRECTOR,
UNITED STATES INFORMATION AGENCY, PETITIONER

v.

CAROLEE BRADY HARTMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a class action may be certified in a sex discrimination case solely on the basis of statistical evidence of sex hiring disparities in the job categories at issue.

2. Whether, by not presenting the argument on a prior interlocutory appeal, the United States Information Agency waived its argument that class members should not have been permitted to intervene as named plaintiffs and class representatives in this case because they had not exhausted their administrative remedies, even though the prior appeal occurred before those new named plaintiffs moved to intervene.

PARTIES TO THE PROCEEDINGS

Petitioner (defendant in the district court and appellant in the court of appeals) is the Director of the United States Information Agency (USIA). Respondents (plaintiffs in the district court and appellees in the court of appeals) are Carolee Brady Hartman, Luba DeMedina, Toura Kem, Rose Kobylinski, Josefa Martinez, Pushpa Agnihotri, Judith Ambrose, Nancy Coffey, Myra Converse, Sonya Davis, Patricia DeYoung, Claire Frankel, Lynn Goldman, Jahanara Hasan, Lisa Heilbronn, Sheila Hoban, Ruthann Irish, Elsa Rael, Honora Rankine-Galloway, Michal Shekel, Yolanda Marshall Tisdale, Carolyn Turner, Shirley Hill Witt, Pamela Woodard, Donna Woolf, and a class of women who applied for employment in non-clerical positions at USIA between October 8, 1974, and November 16, 1984.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Director of the United States Information Agency, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals from which review is sought (App. 1a-14a)[1] is reported at 88 F.3d 1232. The opinion of the district court (App. 246a-310a) is reported at 158 F.R.D. 525.

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[1] "App." refers to the separately bound appendix to this petition.

The initial order of the district court conditionally certifying a class action (App. 15a-16a) is unreported. The initial decision of the district court dismissing the case on the merits (App. 12a-34a) is reported at 21 Fair Empl. Prac. Cas. (BNA) 75. The opinion of the court of appeals reversing that dismissal in part and remanding for further proceedings (App. 35a-78a) is reported at 686 F.2d 997.

The decision of the district court on remand finding petitioner liable on the merits (App. 79a-110a) is reported at 600 F. Supp. 361. A subsequent opinion and order of the district court amending the class certification and establishing remedial proceedings (App. 111a-180a) is reported at 678 F. Supp. 312. The order of the district court denying reconsideration of its remedial order (App. 181a-189a) is unreported. A further decision of the district court with regard to remedies (App. 190a-207a) is unreported. The opinion of the court of appeals remanding for reconsideration of the class certification issue (App. 208a-245a) is reported at 19 F.3d 1459.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1996. A petition for rehearing was denied on October 23, 1996. App. 313a-314a. On January 13, 1997, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 20, 1997. On February 12, 1997, the Chief Justice further extended the time within which to file a petition to and including March 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Section 717 of Title VII of the Civil Rights Act of 1964, as added by Section 11 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111, codified at 42 U.S.C. 2000e-16, prohibits discrimination in employment by the federal government on the basis of race, color, religion, sex, or national origin. That provision is reproduced at App. 315a-319a.

Rule 23 of the Federal Rules of Civil Procedure, regarding class actions, is reproduced at App. 320a-323a.

STATEMENT

This case presents important questions regarding certification and administration of class actions, in the context of a long-running employment discrimination suit against the United States Information Agency (USIA). The district court certified a class of all women who had applied for non-clerical jobs at USIA within a ten-year period. The court of appeals ultimately affirmed that class certification. The court of appeals held first that statistical evidence of sex disparities in hiring is alone sufficient to satisfy the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a). The court of appeals also concluded that USIA had waived its argument that 20 named plaintiffs should not have been permitted to intervene as class representatives because, on a prior interlocutory appeal (which had occurred before the new named plaintiffs had even moved to intervene), USIA had not raised the issue.

1. This action was filed in 1977 by respondent Carolee Brady Hartman, who sought to represent a class of women who had either applied to or worked

for USIA, and who claimed to have been adversely affected by USIA's employment practices concerning hiring and promotion. App. 18a. In 1978, the district court certified a class of "all women who have applied for employment with or who are currently employed by the [USIA] and who have been or continue to be adversely affected by the discriminatory employment practices of the defendant." App. 16a. USIA employs people in both civil service and foreign service positions, and the certified class included applicants for both kinds of positions.

In October 1979, after a bench trial, the district court amended the class to include only women who had applied for or were currently employed in non-clerical positions at USIA. App. 25a-26a. The court also dismissed the suit for failure to establish a prima facie case of discrimination. App. 32a. In dismissing the case, the district court rejected both parties' statistical evidence and concluded that respondents' evidence of individual instances of discrimination was not persuasive. *Ibid.*

The court of appeals reversed in part. App. 35a-78a. It affirmed the dismissal of the promotion discrimination claims. App. 65a-66a. It concluded, however, that the district court had held respondents to too high a standard in evaluating their statistical evidence. In particular, it held that the district court had defined too narrowly the relevant labor pool in the general population to be used for comparison purposes in order to show sex hiring disparities in particular job categories at USIA. App. 41a-64a.[2]

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[2] The court of appeals also affirmed the district court's dismissal of one individual claim that had been consolidated with the class action, and reversed the dismissal of another

2. On remand, the district court found, on the basis of the existing record, that statistical disparities established a prima facie case of discrimination in hiring in six USIA job categories: electronic technician, foreign language broadcaster, production specialist, writer/editor, foreign information specialist, and radio broadcast technician. Those positions comprised about 50% of USIA's workforce. App. 97a. Concluding that USIA's statistics failed to rebut the plaintiffs' prima facie case, the district court found USIA liable for discrimination in hiring in those six categories. App. 109a.[3]

The district court subsequently held a remedial trial and issued a decision establishing remedial procedures. The court first narrowed the class to include only women who had applied for one of the specific six positions at issue in the suit between October 8, 1974, and November 16, 1984. App. 127a-134a. The court then held that, as to applicants for civil service positions, a special master would hold so-called *Teamsters* hearings, in which purported class members would be allowed to establish their entitlement to relief by showing that they had unsuccessfully applied for the positions (the burden would then shift to USIA to show that the class member had been denied a position for lawful reasons). App. 149a-153a; see generally *International Bhd. of*

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individual claim on exhaustion grounds. App. 67a-73a. The court of appeals remanded for further findings on class claims of retaliation, which had been included in a supplemental complaint. App. 66a.

[3] The district court also found that USIA had unlawfully discriminated against one of the individual named plaintiffs in failing to hire her, App. 80a-86a, and dismissed the class claim of retaliation, App. 86a-93a.

Teamsters v. *United States*, 431 U.S. 324, 372 (1977). Applicants for certain foreign service positions were to be ranked according to their scores on the written portion of the foreign service exam and then invited, in descending order of their examination scores, to sit for the oral portion of the exam. App. 160a-164a.[4]

3. USIA then took an interlocutory appeal under 28 U.S.C. 1292(a)(1) on several issues, including the propriety of the class certification, the liability ruling, and the scope of the remedy. On that appeal, USIA challenged the district court's class certification, contending that the individual plaintiffs had not shown, as required by Federal Rule of Civil Procedure 23, that their claims were typical of those of the class, or that the case presented common questions of law or fact.[5] The court of appeals remanded for further proceedings, concluding that the district court had not made findings sufficient to sustain the class certification decision or to permit appellate review of that decision. App. 232a-245a.

The court of appeals noted that, although the district court had narrowed the class it had originally certified by excluding persons who had applied for clerical positions, respondents were still required "to demonstrate the requisite commonality and typicality in order to maintain the suit as a class action." App. 234a. The court pointed out that, under *General*

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[4] In a subsequent remedial decision, the district court ordered USIA to set aside 39 foreign service positions, to be filled with class members over the course of three years. App. 205a. The court of appeals found that number to be excessive, and remanded the matter for further consideration. App. 13a-14a.

[5] USIA also challenged the district court's finding of liability and contended that the number of positions set aside for foreign service applicants was excessive.

Telephone Co. v. *Falcon*, 457 U.S. 147 (1982), "there is more to a showing of commonality than a demonstration that class plaintiffs suffered discrimination on the basis of membership in a particular group." App. 238a. Where a proposed class cuts across job categories, the court explained, "plaintiffs must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." App. 239a.

The court of appeals found that, "[w]hile [respondents'] statistics may have demonstrated that discrimination against women applicants to the six USIA job categories was afoot, nothing in the record so far permits the additional inference that class members suffered a *common* injury." App. 238a. The court also stated that "[t]he lack of a specific foundation for treating women applicants to USIA as a class *a fortiori* undermines the further effort to branch out and include foreign service officers in the plaintiff class." App. 240a. The court noted that, at the liability trial, the district court did not differentiate between civil and foreign service officers in determining that USIA had discriminated in the six job categories. It also observed that the finding of liability "was based solely on an unrebutted *prima facie* case made out by statistics," and it cautioned that, "[w]hile statistics can generally be probative of the question of commonality, we would feel uncomfortable in resting on the trial statistics in the present record for a final determination of commonality." App. 241a.

The court of appeals directed the district court on remand to "conduct a more rigorous inquiry into commonality and typicality." App. 243a. It instructed

the district court to determine whether the class had been properly certified in 1978, and, even if certification had not been proper in 1978, also to consider whether certification was nevertheless appropriate after the liability trial. With regard to the latter point, the court of appeals cautioned the district court to exclude from consideration any evidence "that *could only* have been developed *as a result* of the initial (improper) decision to certify the class." App. 244a. The court believed that the use of such flawed evidence to support the post-trial certification was not likely to be a problem, however, because (the court stated) USIA's "principal challenge" was that the statistics presented at trial were the outgrowth of an improper certification, and the court "[did] not expect the district court to rely solely on the trial statistics in its reevaluation of the propriety of class certification." *Ibid.* The court observed further that among the options available to the district court on remand were "creating sub-classes, certifying a narrower class, or adding additional class representatives." *Ibid.*

4. On the second remand, the district court allowed 20 members of the class to intervene as named plaintiffs and class representatives. In doing so, it rejected USIA's contentions that the intervenors were not proper class representatives because they had failed to exhaust their administrative remedies, and because their claims were defective on the merits. App. 250a-263a. With regard to the exhaustion point, the district court relied on court of appeals cases applying the doctrine of "vicarious exhaustion" to conclude that the intervenors' claims were sufficiently similar to respondent Hartman's claim to

make individual exhaustion by the intervenors unnecessary. App. 259a-263a.

The district court then reaffirmed its decision to certify the class. It concluded first that its decision in 1978 to certify the class was correct. App. 268a-270a. It also held that its certification of the class was proper as of the record compiled by 1994, specifically including the testimony of the new intervenors about the discrimination they had allegedly suffered. App. 270a-291a.

With regard to the initial 1978 certification, the district court found that existence of commonality and typicality was supported by evidence of "numerous subjective and discriminatory practices," including "the use of overt sexist comments in denying positions to females, preferences for males in full time jobs at USIA, the subjective application of hiring criteria, unfair testing procedures, active discouragement of females from pursuing jobs at the USIA, concealment of vacancies by hiring officials from qualified females, and the preselection of male candidates for positions sought by women." App. 269a-270a. As to whether a class might be certified properly in 1994, the court found that respondents had identified four discriminatory practices that cut across all six job categories in which it had found discrimination, including foreign service positions. Those practices were: "(1) overt discrimination and express limitations on the employment of women; (2) disparate application of subjective criteria to deny women positions, including biased evaluations of tests and credentials; (3) discouragement of female applicants, including the failure to respond to their applications; and (4) the use of discriminatory recruitment devices, including

preselection of men, to avoid hiring qualified women." App. 271a.

5. USIA then took another appeal, again challenging the district court's class certification decision, as well as its ruling permitting intervention, its liability determination, and the scope of the remedy. The court of appeals affirmed the district court as relevant here, with regard to class certification and intervention. App. 4a-6a, 8a-9a.

a. With regard to the intervention, the court of appeals *sua sponte* determined that USIA had waived its argument that the new named plaintiffs should not have been permitted to intervene, by failing to raise any challenge to those plaintiffs' status as class members on the prior interlocutory appeal. App. 5a-6a. The court noted that USIA had argued to the district court that the 20 class members should not be permitted to intervene as additional named plaintiffs because they had failed to exhaust their administrative remedies. App. 4a. It also stated that, on the appeal before it, USIA disputed the district court's application of the vicarious exhaustion doctrine, "claiming among other things that the few administrative complaints actually filed [by the original named plaintiffs] were not precise enough to fulfill the purposes of the [vicarious exhaustion] doctrine, such as putting the agency on notice and allowing for administrative resolution of the claims." App. 4a-5a.

The court declined to reach USIA's challenge to the district court's application of the vicarious exhaustion doctrine, for it concluded that USIA had had "ample opportunity" to raise the exhaustion issue on its prior appeal. App. 5a. The court stated that USIA's "theory here depends simply on the absence of individual exhaustion and on the vagueness of the

administrative complaints of those who did exhaust." *Ibid.* But, the court noted, "the vast majority of the members of the class have not exhausted their administrative remedies (and the intervenors are and have always been members of the class)." *Ibid.* Therefore, according to the court, "the filing of petitions for intervention as named plaintiffs did nothing to enhance [USIA's] ability to raise the issue of exhaustion by plaintiffs who * * * failed to exhaust their remedies personally." *Ibid.* The court therefore found that USIA had waived its right to challenge intervention, even though respondents did not raise the waiver issue.

b. The court also affirmed the district court's certification of the class. The court noted that the district court had identified "four 'practices' evidencing a common policy of discrimination that largely cut across job categories," and that USIA had contended that "these supposed 'practices' amount simply to anecdotal evidence of subjective discrimination." App. 9a. The court determined, however, that it need not address USIA's challenge to the evidence actually relied on by the district court to support class certification, because the statistical evidence of sex disparity in hiring presented at trial was alone sufficient to support class certification. See *ibid.*

The court acknowledged that, in its prior decision, it had "hesitated to suggest that the certification finding might be based on statistical evidence alone." App. 9a. It reasoned, however, that its earlier doubts about the use of statistical evidence to support class certification had been based on concern that the statistical evidence itself "might have been 'premised on the (improper) class certification [in 1978],' a concern that appears to have been significantly driven

by [respondents'] blurring of lines between the civil service and the foreign service." *Ibid.* (citation omitted). But, the court of appeals ruled, since USIA no longer challenged the inclusion of civil service and foreign service applicants in a single class, "and with [USIA] making no argument as to why the statistical evidence would not have been admissible in trials of individual cases brought on behalf of *any* particular class member, the case no longer appears to present any reason for that concern." *Ibid.* Accordingly, the court found no abuse of discretion in the certification of the class.[6]

REASONS FOR GRANTING THE PETITION

The court of appeals has issued two important decisions regarding the certification and administration of class actions in the context of employment discrimination cases. Both of those decisions are erroneous, and both have broad implications for class

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[6] The court of appeals affirmed the finding of classwide liability, concluding that USIA had waived its challenges to the statistical evidence on which the district court's liability finding was based. App. 10a-13a. The court also rejected USIA's argument that, in light of the allegations by the intervenors of discriminatory practices at USIA, the district court should have permitted further discovery and an opportunity for USIA to rebut those allegations before ruling on liability. According to the court, the new evidence presented by the intervenors did not go to the issue of liability but rather only to the issue of class certification. App. 12a-13a.

The court of appeals also concluded that the district court had improperly computed the number of foreign service positions to be set aside for class members, App. 13a-14a, and had improperly disregarded its own earlier finding against Hartman on her individual discrimination claim, which appeared to be law of the case, App. 6a-8a. The court remanded both issues for further consideration by the district court.

actions generally and for class actions against the government specifically. Review by this Court is therefore warranted.

The court of appeals first concluded that the commonality and typicality requirements for an employment-discrimination class action may be satisfied *solely* by statistical evidence of hiring disparities in the job categories at issue, without any comparison of the specific allegations of the named plaintiffs to the discriminatory practices that are alleged to have been suffered by the other, unnamed members of the purported class. That conclusion is inconsistent with this Court's decision in *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), which held that, to maintain an employment-discrimination suit as a class action, plaintiffs must allege specific, identifiable discriminatory practices by the employer commonly affecting the members of the class. Statistics of sex disparities in hiring, which the court of appeals concluded were sufficient to support class certification here, shed no light on whether such disparities are the result of one or more common practices affecting the class as a whole. The court of appeals' decision ignores the teaching of *Falcon* and, in essence, permits employment-discrimination suits to proceed as class actions where the putative class members have nothing in common except (a) a broad job category to which they applied and (b) some allegation of discrimination on the basis of a shared attribute—race, color, religion, sex, or national origin—that is covered by Title VII. Absent is any requirement that plaintiffs show that an identifiable discriminatory practice (or practices) were applied to the class as a whole.

The court of appeals' holding on intervention also misapprehends class action principles and undermines the utility of class actions as an efficient method of resolving disputes. The court held that USIA had waived its arguments against intervention by individual class members who had not exhausted their administrative remedies because it had not raised its exhaustion arguments on a prior interlocutory appeal. That conclusion, however, is quite erroneous, for USIA had no reason to raise the class members' failure to exhaust their administrative remedies until they sought to intervene as named plaintiffs and class representatives. And the consequence of the court of appeals' waiver ruling is that class-action defendants must scrutinize and contest the claims of every absent class member at the outset of the case, since any one of those absent class members might seek to become a class representative at some later stage in the litigation.

The court of appeals' decision, if left unreviewed, would have a particularly profound impact on class-action litigation against the federal government. Because the District of Columbia is the seat of government, venue lies in the United States District Court for the District of Columbia for most employment-discrimination class actions against federal agencies. Accordingly, it is to be expected that plaintiffs filing employment-discrimination class actions against federal agencies will seek to take advantage of the D.C. Circuit's erroneous rulings by filing suit in that district. Thus, even though the court of appeals' rulings are so unprecedented that we

cannot point to a conflict with the decisions of other circuits, those rulings warrant review by this Court.[7]

1. a. Federal Rule of Civil Procedure 23(a) requires, as "[p]rerequisites to a [c]lass [a]ction," that the class representatives show that "there are questions of law or fact common to the class," and "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(2) and (3). In two decisions, this Court has made clear that an employment-discrimination class action may be certified under Rule 23 only when a rigorous analysis of the relevant claims reveals that the named plaintiffs' discrimination claims and those of the class actually share

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[7] The court of appeals' reliance on statistical evidence alone to support class certification is, however, in tension with the decision of the Eighth Circuit in *Chaffin* v. *Rheem Manufacturing Co.*, 904 F.2d 1269 (1990). In *Rheem*, the court affirmed the denial of class certification in a Title VII case because the individual named plaintiff, who claimed racial discrimination in promotions, could point to only one or two other black employees who might have been discriminated against in promotions, and otherwise relied on statistical evidence, which the district court had found to be "bareboned." *Id.* at 1276. Relying on *Falcon*, the court of appeals agreed with the district court's conclusion that the plaintiff's claims of disparate treatment "were primarily claims of racial discrimination individual to him and, as such, did not support a class action." *Ibid.* District courts have also been skeptical of relying on statistical evidence to support class certification, and have noted that *Falcon* requires evidence that the employer applied a discriminatory practice to the class. See, *e.g.*, *Churchill* v. *IBM, Inc.*, 759 F. Supp. 1089, 1101 (D.N.J. 1991); *Ross* v. *Nikko Sec. Co.*, 133 F.R.D. 96, 96-97 (S.D.N.Y. 1990); *Price* v. *Cannon Mills*, 113 F.R.D. 66, 71 (M.D.N.C. 1986); *Sheehan* v. *Purolator, Inc.*, 103 F.R.D. 641, 648-649 (E.D.N.Y. 1984), aff'd, 839 F.2d 99 (2d Cir.), cert. denied, 488 U.S. 891 (1988).

specific, common issues of fact or law, and that the named plaintiffs' specific claims are typical of those of the class. The court of appeals' ruling that a class action may be certified on statistical evidence alone departs from this Court's rulings.

In *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), the Court reversed a decision by the Fifth Circuit certifying a class in a Title VII case despite district court findings, left undisturbed on appeal, that the class representatives were unqualified for the positions allegedly denied to them on the basis of race and national origin. This Court emphasized that at the time of certification, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id.* at 403 (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). The Court observed that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs," but it stressed that "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." 431 U.S. at 405.

Subsequently, in *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), the Court disapproved the use of so-called "across-the-board" class actions, in which named plaintiffs purported to represent the class of persons who were alleged to be affected by all the unequal employment practices allegedly committed by an employer pursuant to a policy of racial discrimination. See *id.* at 152, 157. In that case, the named plaintiff, a Mexican-American who alleged that his employer had discriminated against him in hiring and promotion on the basis of his national origin, purported to represent a class of all Mexican-American

employees and all Mexican-American applicants for employment who had not been hired. The district court held that the plaintiff had suffered discrimination in promotion but not in hiring, and reached converse conclusions about the class. *Id.* at 152. The district court's findings on classwide liability were based largely on statistical evidence of hiring disparity. See *id.* at 159.

This Court held that the named plaintiff was not an appropriate representative for the class of Mexican-American applicants for employment that the employer did not hire. The Court held, in particular, that a plaintiff who alleges discrimination in *promotion* cannot be presumed to qualify as a class representative for persons of similar national origin aggrieved by the employer's *initial hiring* practices. 457 U.S. at 158-159. The Court stressed that, "[c]onceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual." *Id.* at 157. And the Court concluded that, "to bridge that gap," a named plaintiff who alleges discrimination in an array of employment practices must show not only that the discriminatory treatment he experienced was typical of the employer's promotion practices, but also that the employer's policy of discrimination was "reflected in [the employer's] other employment practices, such as hiring, *in the same way* it is manifested in the promotion practices." *Id.* at 157-158 (emphasis added). The Court required a "specific presentation identifying the questions of law or fact that were common to the

claims of respondent and of the members of the class he sought to represent." *Ibid.*[8]

The Court further noted in *Falcon* that, as might be expected, the plaintiff had attempted to prove his individual claim through direct proof of intentional discrimination and the class claims through statistical evidence of disparate impact. 457 U.S. at 159. Given the gap between the proofs on the individual claim and the class claims, the Court observed that the two claims "might as well have been tried separately." *Ibid.* In that situation, the Court concluded, there was little benefit in the nature of efficient and economical litigation to allow the plaintiff to represent a class of persons who had allegedly suffered from an entirely different discriminatory practice. *Ibid.* And the Court reemphasized that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161.

b. The court of appeals' decision, sustaining the class action in this case on the basis of statistical evidence alone, departs from the Court's decisions in *Rodriguez* and *Falcon*. Whatever the relevance of

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[8] The Court noted that, in some circumstances, the same discriminatory policy might manifest itself in both hiring and promotion decisions—as where the employer uses a biased testing procedure in both contexts, or where there is "[s]ignificant proof that an employer operated under a general policy of discrimination * * * if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." 457 U.S. at 159 n.15. But, the Court emphasized, "it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination." *Ibid.*

the statistical evidence on the merits to show sex disparities in employment practices at USIA, that evidence does not show anything in the nature of commonality or typicality—it does not demonstrate any relation between the practices alleged to have affected named plaintiffs and the practices allegedly visited upon the class as a whole.

In its decision on USIA's first appeal, the court of appeals held that the district court's initial class certification was not based on the "rigorous inquiry" into commonality and typicality required by *Falcon*. App. 243a. The court of appeals noted specifically that, "[w]hile [respondents'] statistics may have demonstrated that discrimination against women applicants to the six USIA job categories was afoot, nothing in the record so far permits the additional inference that class members suffered a *common* injury." App. 238a. The court further observed that "we do not expect the district court to rely solely on the trial statistics in its reevaluation of the propriety of class certification." App. 244a.

On remand, the district court attempted to implement the court of appeals' instructions by identifying four hiring "practices" that, it found, cut across the six job categories in which it had already found liability for discrimination. In concluding that respondents had met their burden under Rule 23, the district court relied exclusively on anecdotal evidence presented by individual members of the class before, during, and after the liability trial. It did not rely on the statistical evidence of hiring disparities in the trial record. Indeed, characterizing the instructions it had received on remand, the district court stated that "[t]he Court of Appeals made clear that this

Court cannot rely on trial statistics to * * * certify the class." App. 270a.

In the subsequent appeal, USIA argued that the four "practices" identified by the district court were individual anecdotes without a common pattern and did not establish commonality and typicality as required under both *Falcon* and the court of appeals' prior opinion. The court of appeals acknowledged but declined to address that argument. Instead, the court of appeals concluded that it could uphold the class certification on the basis of the trial statistics alone —even though the district court had not relied on those statistics *at all* in making its certification decision. See App. 9a, 270a.

By relying solely on the statistical evidence of hiring disparities presented at trial, the court of appeals made a fundamental error. As the description of that evidence in the district court's liability decision makes clear, the trial statistics simply compare the numbers of women employed by USIA in its major non-clerical job categories with the numbers of women who would be expected to be employed in those categories based on their availability in the relevant labor market. App. 98a. While that statistical evidence may be relevant to an ultimate finding as to whether there was discrimination in any particular job category, it says nothing as to *how* any discrimination was manifested with respect to any particular position—that is, the particular discriminatory practices that may have been used. Nor does it say anything as to whether the discriminatory practices alleged to have affected the named plaintiffs also affected any other members of the class. Without specific evidence demonstrating that the discriminatory practice allegedly suffered by the class repre-

sentatives is the *same* practice as that alleged to have resulted in classwide discrimination, there is no more connection between the named plaintiffs' claims and the class claims here than there was between the two in *Falcon*, where the finding of classwide liability was also based on statistical evidence of hiring disparities. See 457 U.S. at 159.

Respondents' statistical evidence of hiring disparities therefore cannot provide a basis for the finding, deemed essential to class certification by this Court in *Rodriguez* and *Falcon*, that the same employment practices affected the class as well as the named plaintiffs. Such a finding depends on evidence that describes or permits a finding of particular employer conduct (or perhaps a comprehensive employer policy of discrimination that was manifested in a particular fashion, see *Falcon*, 457 U.S. at 159 n.15). To rely, as the court of appeals did here, solely on statistical evidence of disparities in hiring, promotion, or other aspects of employment to support class certification is to ignore Rule 23's requirement of a *common* employment practice affecting the class.

Contrary to the court of appeals' suggestion (App. 9a), the inadequacy of the trial statistics as a foundation for the findings of commonality and typicality required by Rule 23 goes beyond the statistics' failure to distinguish between civil service and foreign service positions, which the court of appeals had emphasized in its opinion in USIA's first appeal (see App. 240a-242a). The statistics—which simply point to disparities in employment of men and women in USIA job categories at certain "snapshot" points—are unrevealing about any specific employment practices that might have caused disparities in the representation of women in the USIA workforce, let

alone whether those practices extended across the full range of positions covered by the district court's class certification. The court of appeals therefore erred in concluding (App. 8a-9a) that, because USIA did not specifically address the civil service/foreign service distinction in its arguments against the "common practices" identified by the district court on remand, the court of appeals was free to disregard those arguments and affirm the certification on the basis of the statistical evidence alone.

2. The court of appeals also erred in concluding—*sua sponte*, and without the benefit of briefing on the point—that USIA had waived its right to challenge intervention as named plaintiffs and class representatives by 20 individuals who had previously been merely absent members of the class. In the courts below, USIA contended, among other things, that those 20 individuals should not be permitted to intervene because they had not exhausted their administrative remedies.[9] The court of appeals concluded, however, that USIA had waived its right to present that challenge because USIA knew at the time of its

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[9] It is well established that exhaustion is a prerequisite to filing suit alleging employment discrimination under Title VII. *Brown* v. *GSA*, 425 U.S. 820, 832-833 (1976). During the relevant period, regulations of the Equal Employment Opportunity Commission required an aggrieved government employee to contact an agency equal employment opportunity counselor within 30 days of the alleged discriminatory incident. 29 C.F.R. 1613.213(a), 1613.214(a)(1)(i) (1995). If the counselor was unable to resolve the complaint informally, the employee had 15 days from his final interview with the counselor to file a formal complaint with the agency. 29 C.F.R. 1613.213(a), 1613.214(a)(1)(ii) (1995). Current regulations give the employee 45 days from the alleged discrimination to initiate the informal conciliation process. See 29 C.F.R. 1614.105(a)(1).

first appeal that some members of the class had not exhausted their administrative remedies personally. Thus, according to the court, the filing of the petition for intervention naming 20 new class representatives "did nothing to enhance [USIA's] ability to raise the issue of exhaustion." App. 5a.

The court of appeals' conclusion is erroneous on two counts. First, before the 20 class members filed their petition for intervention, there was no reason for USIA to raise the issue of their failure to exhaust their administrative remedies. Before the petition for intervention was filed, whether any *individual* absent member of the class had suffered discrimination and was entitled to relief had no direct bearing on the issue of *classwide* liability. Cf. *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 877-878 (1984) (class members may pursue individual claims for discrimination, even if court has found that employer did not engage in classwide discrimination). Those 20 class members sought to intervene for the purpose of establishing an evidentiary foundation for the element of typicality necessary to support a class action: Rule 23(a) requires that "the claims * * * of the *representative parties* [be] typical of the claims * * * of the class" (emphasis added). Without the additional evidence presented by those intervenors, respondents' evidence of typicality was considerably weaker. Thus, only after the petition for intervention was filed did the intervenors' failure to exhaust gain any relevance to the maintenance of the class action.[10]

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[10] The individual class members' failure to exhaust their remedies would be relevant to the individual *Teamsters* remedial hearings, in which class members may establish their entitlement to individual relief after the court has found that

Second, before the petition for intervention was filed, USIA had no basis for determining whether the individual intervenors' claims were sufficiently similar to those of the class members who did personally exhaust their remedies to permit those intervenors to rely on the doctrine of "vicarious exhaustion." In *Foster* v. *Gueory*, 655 F.2d 1319 (D.C. Cir. 1981), the case cited by the court of appeals for the proposition that "exhaustion of administrative remedies by one member of the class satisfies the requirement for all others with sufficiently similar grievances" (App. 4a), the court held that persons seeking to intervene as additional named plaintiffs in an employment discrimination case should not be denied intervention on the ground of failure to exhaust when the claims of the original plaintiffs and those of the intervenors "are so similar that it can fairly be said that no conciliatory purpose would be served by filing separate EEOC charges." 655 F.2d at 1322. Thus, whether an individual plaintiff who seeks to intervene as a class representative can escape the exhaustion requirement depends upon an analysis that can only be performed once the proposed intervenor steps forward and articulates her claim.

Under the court of appeals' rule, however, a class-action defendant would have to take discovery, at the earliest opportunity, of class members who are *not* named plaintiffs and representative parties to determine whether those absent class members' claims could satisfy the vicarious exhaustion rule; otherwise, class members could wait until a very late

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the employer discriminated against a class. Their failure to exhaust had no direct relevance to the issue of classwide liability, however, until they sought to intervene.

stage of the litigation to intervene, at which point the defendant could do little to challenge their suitability as intervenors. That result effectively turns settled class action law on its head. The courts have held that nonrepresentative plaintiffs are not "parties" for purposes of discovery, see *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 562 n.1 (E.D.N.Y. 1985), and that absent class members should not routinely be required to submit to discovery. *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999, 1005 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972); *United States* v. *Trucking Employers, Inc.*, 72 F.R.D. 101, 104 (D.D.C. 1976); *In re Carbon Dioxide Indus. Antitrust Litig.*, 155 F.R.D. 209, 212 (M.D. Fla. 1993); *Transamerican Refining Corp.* v. *Dravo Corp.*, 139 F.R.D. 619, 621 (S.D. Tex. 1991). As the court explained in *Wainwright* v. *Kraft Co.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972): "The usefulness of Rule 23 would end if class members could be subjected to [the discovery rules] and forced to spend time, and perhaps engage legal counsel, to answer detailed interrogatories." To require an agency to inquire into the specifics of each class member at the outset of the litigation, because 15 years later a class member might seek to become a class representative, could seriously undermine the usefulness of the action vehicle. Cf. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553-554 (1974).

3. The decision of the court of appeals warrants review because of its broad implications for class action litigation. The court of appeals' reliance on statistics alone to support certification of a broad class (here, cutting across half the positions at USIA) significantly lightens plaintiffs' burden of demonstrating that a class action is appropriate and undermines this Court's instruction that a "rigorous

analysis" of typicality and commonality is necessary for certification under Rule 23. The intervention ruling makes it incumbent on class action defendants to engage in discovery of unnamed class members, in contravention of settled law. Both rulings have particular significance because of the federal government's amenability to suit in the District of Columbia. Accordingly, even in the absence of an explicit conflict among the courts of appeals, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH DUFFEY, DIRECTOR,
UNITED STATES INFORMATION AGENCY, PETITIONER

v.

CAROLEE BRADY HARTMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5030

CAROLEE BRADY HARTMAN, ET AL., APPELLEES

v.

JOSEPH DUFFEY, DIRECTOR, UNITED STATES INFORMATION AGENCY, APPELLANT

Appeal from the United States District Court for the District of Columbia (No. 77cv02019)

[Filed: July 19, 1996]

Before: SILBERMAN, STEPHEN F. WILLIAMS and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILLIAMS.

WILLIAMS, Circuit Judge:

This case appears before us on appeal for the third time. A sex discrimination class action against the United States Information Agency ("USIA"), it has been working its way up and down the system for nearly 20 years. The end may be at hand—or at least further progress into the remedial phase may be. We

find most of defendant's arguments—which concern both certification and liability—to be either waived or barred by law of the case. We affirm the judgment except as it concerns the individual claim of plaintiff Carolee Brady (Hartman) and the decision setting aside 39 foreign service officer slots to be filled by class members.

* * *

The facts and procedural posture of this case are described at length in our second pass at it, *Hartman v. Duffey*, 19 F.3d 1459, 1461-63 (D.C.Cir.1994), so we will give only a brief summary here. In November 1977 Carolee Brady Hartman[1] filed a sex discrimination class action against the USIA, and in April 1978 the district court conditionally certified a class of women under F.R. Civ. Pro. 23(b)(2). After the parties agreed to bifurcate the trial into a liability and a remedy stage, the district court held a bench trial on class liability and found that plaintiffs had failed to establish a prima facie case of sex discrimination. *De Medina v. Reinhardt*, 21 Fair Empl. Prac. Cas. (BNA) 75, 1979 WL 39 (D.D.C.1979). On the first appeal, we reversed the dismissal of the hiring discrimination claim because we found error in the court's treatment of the statistical evidence. *De Medina v. Reinhardt*, 686 F.2d 997, 1002 (D.C.Cir.1982). On remand, the district court found that the USIA had discriminated against women in hiring for six occupational categories. *Hartman v. Wick*, 600 F.Supp. 361 (D.D.C.1984). In 1988 the

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[1] Ms. Hartman later changed her name to Brady, but in order to reduce confusion we will follow the parties in continuing to use the name Hartman.

district court laid out the framework for relief, *Hartman v. Wick*, 678 F.Supp. 312 (D.D.C.1988), ruling that unless the parties agreed otherwise, class members who applied for *civil* service positions were to be given "*Teamsters*" hearings to determine relief on an individual basis. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 372, 97 S.Ct. 1843, 1873, 52 L.Ed.2d 396 (1977).[2] For applicants for *foreign* service jobs, the district court in 1992 set aside 39 slots to be filled by class members over the next three years. *Hartman v. Gelb*, No. 77-2019 (D.D.C. July 9, 1992) ("July 1992 order"). The USIA appealed.

On the second appeal, we addressed only the question of class certification, saying that the record did not adequately demonstrate that a class existed. 19 F.3d at 1472. We remanded, holding that "plaintiffs must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." 19 F.3d at 1472 (analyzing *General Tel. Co. v. Falcon*, 457 U.S. 147, 159, 102 S.Ct. 2364, 2371, 72 L.Ed.2d 740 (1982)).

After our remand, twenty class members representing the six job categories petitioned for

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[2] At a *Teamsters* hearing each plaintiff must show by a preponderance of the evidence that she applied for a job during the relevant time period and was rejected. The burden then shifts to the defendant to show that there was a legitimate reason for not hiring the applicant. If defendant meets that burden, the plaintiff can offer evidence indicating that the proffered reason is simply a pretext for discrimination. See *Hartman v. Wick*, 678 F.Supp. at 335; *Hartman v. Duffey*, 19 F.3d at 1462 n. 2.

intervention as named plaintiffs, and the district court approved intervention as of right under F.R. Civ. Pro. 24. *Hartman v. Duffy*, 158 F.R.D. 525, 535-36 (D.D.C.1994). He further found that the class was properly certified both in 1978 and now, holding that plaintiffs had identified four discriminatory practices that demonstrated a common policy of discrimination sufficient to support the initial class certification. *Id.* at 538-39. (We return to these practices later.)

The USIA now appeals again, asserting a variety of errors. Primarily because of law of the case and waiver, we reject all of defendant's arguments except those specifically concerning Hartman herself and the 39 foreign service slots.

I. Vicarious Exhaustion of Administrative Remedies

The USIA argued to the district court on the latest go-around that class members should not be permitted to intervene as additional named plaintiffs because they had failed to exhaust their administrative remedies. 158 F.R.D. at 535. The district court applied this court's doctrine of vicarious exhaustion—that exhaustion of administrative remedies by one member of the class satisfies the requirement for all others with sufficiently similar grievances, see *Foster v. Gueory*, 655 F.2d 1319, 1322-23 (D.C.Cir.1981)—and therefore allowed the intervention. On this appeal, the USIA disputes the district court's application of the vicarious exhaustion doctrine, claiming among other things that the few administrative complaints actually filed were not precise enough to fulfill the purposes of the doctrine, such as putting the agency

on notice and allowing for administrative resolution of the claims.

We do not reach the merits of defendant's arguments on this issue because of the defendant's failure to pursue it in its prior appeal. "[W]here an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand." *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C.Cir.1989). The rule serves judicial economy by forcing parties to raise issues whose resolution might spare the court and parties later rounds of remands and appeals. *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740 (D.C.Cir.1995).

The USIA had ample opportunity to raise the exhaustion issue on its previous appeal when it challenged class certification. Its theory here depends simply on the absence of individual exhaustion and on the vagueness of the administrative complaints of those who did exhaust. As the vast majority of the members of the class have not exhausted their administrative remedies (and in fact the intervenors are and have always been members of the class), the filing of petitions for intervention as named plaintiffs did nothing to enhance defendant's ability to raise the issue of exhaustion by plaintiffs who in fact failed to exhaust their remedies personally. By arguing the exhaustion point at the appropriate (much earlier) juncture, the USIA could perhaps have undone certification at one stroke. Instead, the agency waited to raise this issue until this late date, almost two decades into litigation and *after* our second opinion in this case focusing almost exclusively on class certification. The omission is all the more striking because the issue had come up in the course of the

litigation before with respect to one named plaintiff. See *De Medina*, 686 F.2d at 1012-13 (finding that the vicarious exhaustion doctrine of *Foster* applied to named plaintiff Kobylinski, whose claims were "virtually identical" to those of named plaintiff Martinez, who had exhausted). We therefore find no error in the district court's order permitting the intervention of additional named plaintiffs.

We note that plaintiffs did not raise this waiver problem. We have in some instances found such silence to be a waiver of a waiver, see, e.g., *Belton v. WMATA*, 20 F.3d 1197, 1202 (D.C.Cir.1994); *Fox v. District of Columbia*, 83 F.3d 1491, 1496 (D.C.Cir.1996), but we do not do so here.[3] We think it would be in only the most extraordinary case that a second-time appellant could escape the consequences of its earlier omission at the end of nearly twenty years of litigation.

II. Hartman's Individual Claims

We do find one aspect of defendant's arguments about lack of vicarious exhaustion to be not waived—and persuasive: that Hartman herself is out of the case because the district court had earlier found that she was not qualified for the job she sought. The only personnel action that Hartman claimed had injured her was rejection of her application for a job on

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[3] The Supreme Court has held that the requirement that a Title VII plaintiff file a timely complaint with the EEOC before gaining access to the courts is not jurisdictional, meaning that it can be waived and—most importantly for purposes of rejecting waiver of waiver—that we need not raise the exhaustion issue on our own initiative. *Zipes v. Trans World Airlines*, 455 U.S. 385, 392-98, 102 S.Ct. 1127, 1131-35, 71 L.Ed.2d 234 (1982).

Horizons Magazine, a USIA publication. In its 1979 opinion rejecting class certification [sic], the district court noted that "[b]oth Ms. Dorothy Crook, then Senior Editor of *Economic Impact*, another Agency publication, and Mr. Robert Korengold, then Editor of *Horizons Magazine*, testified that Ms. Hartman could not have been seriously considered for the position as she did not possess sufficient professional journalism experience." 21 Fair Empl. Prac. Cas. at 80. The court credited this testimony, writing: "The Court *conclusively* accepts the testimony of Ms. Crook and Mr. Korengold on this matter." *Id.* (emphasis added).

That conclusion lay fallow in the record until the most recent remand, when the trial court's apparent change of mind surfaced accidentally. The government pointed out the prior conclusive finding against Ms. Hartman in connection with the analysis of typicality (for certification purposes), 158 F.R.D. at 545, only to be told by the district court: "[T]his Court neither heard nor made a final determination on the merits of Ms. Hartman's individual claim. Ms. Hartman's claim, like those of every other class member who applied for a civil service position, is subject to an individual *Teamsters* hearing before the Special Master." *Id.* at 546.

We do not understand in what sense the district court can mean that its prior "conclusive[ ]" finding was non-final. Although not the subject of a separate judgment under Rule 54 of the Federal Rules of Civil Procedure, it was a "conclusive" ruling that was embraced by the final judgment that was the subject of the first appeal, decided in 1982. (And our decision on the first appeal did not overturn that specific finding.) In an apparent effort to suggest an excep-

tion to the application of law of the case to the issue, the district court observed that plaintiffs cited the affidavit of a USIA Personnel Management Specialist saying that he thought Hartman was qualified for a GS-11 or -12 position in "editorial-type" work. *Id.* at 545-46 n. 16. (The *Horizons Magazine* job was the equivalent of GS-11 or -12.) But this was among the evidence the trial court considered in arriving at its earlier decision, and so does not fit under the exception for new evidence. In any event the personnel specialist was not addressing specific qualifications for the *Horizons Magazine* job. Although plaintiffs suggest no other reason why the finding against Hartman is not in fact "conclusive" under law of the case, in truth the defendant raised the issue only rather obliquely; we remand the case in light of the possibility that there is some overlooked exception to law of the case that might permit revival of her individual claim.

III. The Propriety of Class Certification

Our most recent (1994) opinion dealt at length with the question of class certification in this case, analyzing in considerable detail the Supreme Court's exposition in *General Tel. Co. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), of the commonality requirement in discrimination class actions. See 19 F.3d at 1469-70. We observed that the "principal problem" with certification in this case was that the class "encompasses both civil service and foreign service applicants to the USIA, despite the fact that the two categories are hired under different personnel systems." *Id.* at 1471. Although the latest district court opinion understandably spent considerable time showing that the claimed discriminatory practices cut

across both civil and foreign service categories, see, e.g., 158 F.R.D. at 536-37, 541, 546, the USIA has not, so far as class certification is concerned, addressed the civil service/foreign service difficulty at all on this appeal. So that issue is out of the case.

There remains the general question whether plaintiffs showed sufficient commonality and typicality among the members of the plaintiff class. Under our prior instructions, the district court—as we noted above—identified four "practices" evidencing a common policy of discrimination that largely cut across job categories. 158 F.R.D. at 539. The defendant argues that these supposed "practices" amount simply to anecdotal evidence of subjective discrimination. We need not resolve that claim, however, for even if we resolved it in the defendant's favor we would not find an abuse of discretion in the class certification. *Wagner v. Taylor*, 836 F.2d 566, 578 (D.C.Cir.1987) (reviewing for abuse of discretion). In our most recent pass at this case, we hesitated to suggest that the certification finding might be based on statistical evidence alone. *Hartman*, 19 F.3d at 1474. We expressed concern that some of the statistical evidence might have been "premised on the (improper) class certification," *id.*, a concern that appears to have been significantly driven by the plaintiffs' blurring of lines between the civil service and the foreign service. But with that issue completely out of the case, and with the defendant making no argument as to why the statistical evidence would not have been admissible in trials of individual cases brought on behalf of *any* particular class member, the case no longer appears to present any reason for that concern. Accordingly, we find no properly preserved error in the class certification.

IV. The 1984 Finding of Liability

After the first remand from this court in 1982, neither party sought to introduce new evidence but agreed to submit on the existing record. 600 F.Supp. at 362-63. On the last appeal, referring to the defendant's later effort to introduce new statistics differentiating between the civil and foreign services, we observed that the district court's decision whether to consider new evidence after the close of the liability portion of a bifurcated trial was reviewed only for abuse of discretion. 19 F.3d at 1473 (citing *Segar v. Smith*, 738 F.2d 1249, 1285 (D.C.Cir.1984)). The USIA has again sought to offer new statistical analyses of data in the record, which the district court did not consider. We find no abuse of discretion.

First, the USIA now argues for two-tailed statistical analysis, as opposed to the one-tailed analysis actually performed for trial by plaintiffs' expert. The differences between two-tailed and one-tailed analysis are described in *Palmer v. Shultz*, 815 F.2d 84, 94 (D.C.Cir.1987), which ultimately favors two-tailed analysis for Title VII purposes, id. at 95. The key distinction is that one-tailed analysis tests whether a group is disfavored in hiring decisions while two-tailed analysis tests whether the group is preferred or disfavored. In two-tailed analysis, a larger difference (measured in standard deviations) between the actual incidence of (say) hiring of a class and the "expected value" is necessary before a social scientist would reject the inference that the difference was random. *Id.* at 92-96. On appeal, defendant offers new calculations of standard deviations that it claims reveal no statistically significant disparities in two job categories, using two-tailed analysis for the first

time. But because defendant offered no calculations of standard deviations at all at trial, and indeed never objected to plaintiffs' expert's use of one-tailed analysis, we reject the claim.

For similar reasons, we reject defendant's claim that the district court should have considered yearly hiring statistics rather than the static "snapshot" statistics plaintiffs' expert provided (which might incorporate pre-Civil Rights Act discrimination). At trial, the defendant's expert presented hiring statistics in raw form only, with no effort to compute standard deviations or otherwise offer statistical analysis. In its reply brief the USIA essentially argues that the district court should have calculated the standard deviations itself, an argument plainly inconsistent with the conventional requirement that each party present the evidence and arguments on its side of a case.

On the question of whether civil and foreign service hires should be separated for statistical purposes, the USIA, in contrast to its silence on the point as regards class certification, argues on the liability issue in favor of such separation. But this is not only not the position it presented at trial, but is the opposite of it. At trial defendant's expert insisted that the Foreign Information Specialist Category (which was mostly made up of foreign service officers) could not be separated from the other job categories (mostly made up of civil service members) that he aggregated and compared with the census category "Editors and Reporters."

Finally, the USIA challenges the district court's 1984 "cross-mapping" for the job category of foreign language broadcaster. "Cross-mapping" refers to the process by which the plaintiffs compared the male-

female composition of the workforce in various USIA categories with the male-female composition nationwide in various private-sector job categories defined by the U.S. Census Bureau. The district court found plaintiffs' expert's choice of the Editors and Reporters census category to be "well-reasoned," 600 F.Supp. at 374, rejecting the defendant's preference for the Radio Announcer category. The USIA now argues that broadcasting and announcing experience was an "essential minimum qualification" for the job. But the position description in the record suggests that the requirement was simply one of "a voice suitable for international broadcasting," and other evidence indicates that men were hired for the position despite lack of broadcasting experience. Under the "clearly erroneous" standard, see *De Medina*, 686 F.2d at 1007, we find no reversible error in the district court's factual finding.

The USIA also claims that the district court should not have reaffirmed its liability finding given the new alleged discriminatory practices and evidence from intervenors. But the agency confuses the issues of certification and liability. The intervenors here, who were already members of the class, sought to become named plaintiffs and introduce evidence solely for purposes of certification; the evidence does not go to liability. The defendant having failed to show any properly preserved error in the analysis by which the district court reached its prior finding of liability, the new evidence is unnecessary to plaintiffs' success on that issue. Moreover, as the district court pointed out, the intervention would not adversely affect the anticipated remedial proceedings, as the intervenors who were civil service applicants would simply participate in *Teamsters* hearings just as they would

have as class members, and those who were foreign service applicants would simply join others already seeking the 39 slots the court had set aside. 158 F.R.D. at 532 n. 3. We therefore affirm the district court's refusal to reopen its finding of liability.

V. The 39 Foreign Service Slots

Finally, the USIA objects that in the remedial phase of the case the district court set aside too many foreign service slots to be filled by class members because it included hiring shortfalls for 1985. (Although all 39 slots were to be filled as of December 1995, we do not believe the claim is moot, because, as the parties seem to agree, there is a reasonably high probability of continuing disputes over seniority, the effects of reductions in force, and similar issues.) The problem is that the district court had earlier ruled that "the Defendant's liability ceased as a matter of law" on November 16, 1984, see July 1992 order at 6 n.4, which seems to preclude reliance on inferred hiring shortfalls for 1985 as a basis for creation of remedial slots.

The district court arrived at the figure of 39 by relying on the model of one Dr. Siskin, called by plaintiffs, that was presented at a 1987 hearing on remedies. *Id.* at 10-12. Siskin calculated shortfalls in female hiring of foreign service officers for the years 1979-85, see Joint Appendix 497, which the district court characterized as data for 1978-84, July 1992 order at 12. This apparent error may have beefed up the slot calculation by about ten positions, as the USIA claims, but of course there is also the problem that Siskin's data did not cover 1978 (the first year for which remedy was to be had, *id.* at 2). We accordingly

remand the case to the district court to sort out this conundrum.

* * *

We therefore affirm the district court in most respects, remanding only for consideration of why named plaintiff Hartman's individual claims should not be dismissed and for re-examination of the number of foreign service slots set aside.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 77-2019

CAROLEE BRADY HARTMAN, ET AL., PLAINTIFFS

v.

JOHN REINHARDT, DEFENDANT

[Filed: April 19, 1978]

ORDER

This case is before the Court on plaintiff's motion for class action certification. Although plaintiff's complaint does not state the policies or patterns of discrimination affecting the class with the specificity the Court would prefer, the Court will conditionally certify the class at this time. However, the Court would like to caution the plaintiff that this certification is "conditional" and may be modified by the Court at any time should the record later indicate such to be appropriate. Accordingly, it is, by the Court, this 19th day of April, 1978,

ORDERED, that plaintiff's motion for class action certification pursuant to the provisions of Fed. R. Civ. P. 23(a) and 23(b)(2) be, and the same hereby is, conditionally granted; and it is

FURTHER ORDERED, that the class be, and the same hereby is, conditionally certified to include all women who have applied for employment with or are currently employed by the United States Information Agency and who have been or continue to be adversely affected by the discriminatory employment practices of the defendant.

/s/ CHARLES R. RICHEY
CHARLES R. RICHEY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0360

LUBA S. KOWALYSZYN DE MEDINA, PLAINTIFF

v.

JOHN E. REINHARDT, DEFENDANT

Civil Action No. 78-0762

TOURA KEM, PLAINTIFF

v.

JOHN E. REINHARDT, DEFENDANT

Civil Action No. 77-2019

CAROLEE BRADY HARTMAN, ET AL., PLAINTIFFS

v.

JOHN E. REINHARDT, DEFENDANT

[Filed: Oct. 24, 1979]

RICHEY, D.J.

I. Introduction

This class action is brought by five (5) named plaintiffs on behalf of all women who have applied for employment with, or are currently employed by, the United States International Communication Agency

(the "Agency"), formerly known as the United States Information Agency. The Agency's largest element is the Voice of America (VOA).

The defendant, John E. Reinhardt, is the Director and Chief Executive Officer of the Agency. He is sued in his official capacity. The Agency is an executive agency of the United States within the meaning of 42 U.S.C. § 2000e-16(a).

This Title VII class action originates out of the attempts of Carolee Brady Hartman, a woman, to gain employment with the Agency as a writer/editor. After exhausting her administrative remedies, Ms. Hartman filed this civil action, on behalf of herself and all other persons similarly situated, on November 25, 1977, in compliance with the jurisdictional prerequisites for a Title VII action set forth in 42 U.S.C. § 2000e-16(c). Ms. Hartman's complaint alleges employment discrimination on the basis of sex, in promotion and hiring practices of the defendant Agency, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The class was conditionally certified pursuant to Fed. R. Civ. P. 23(b)(2) on April 19, 1978.

[Consolidations]

Since that time, four (4) other women have joined Ms. Hartman as named plaintiffs in this action. On September 11, 1978, the Court ordered that Ms. Luba Medina, Ms. Rose Kobylinski and Ms. Josefina Martinez be permitted to intervene as named plaintiffs in this action. The complaint in intervention also alleges employment discrimination on the basis of sex, in promotion and hiring practices of the defendant

Agency, in violation of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.

Later, on November 9, 1978, the Court ordered consolidation of a separate Title VII action brought by Ms. Medina against the same defendant, C.A. No. 77-0360, which was then before the Court. This separate, individual Title VII action was filed by Ms. Medina on March 3, 1977. Ms. Medina's complaint alleges employment discrimination on the basis of sex and national origin, in practices of the defendant Agency, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) and 3(b), and 42 U.S.C. §§ 1981 and 1983.

In addition, *Kem v. Reinhardt*, C.A. No. 78-0762, a Title VII action brought against the same defendant by a rejected job applicant named Toura Kem, was consolidated with this action on November 22, 1978. This separate, individual Title VII action was filed by Ms. Kem on April 29, 1978. Ms. Kem's complaint alleges employment discrimination on the basis of sex, in "certain acts, practices, and courses of conduct" of the defendant Agency, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

The parties agreed that the trial of this case was to be bifurcated into a "liability" stage and a "relief" stage. Issues of entitlement to specific relief by individual members of the class would be postponed until a later stage in the proceedings in the event that plaintiffs were successful in demonstating a pattern or practice of discrimination by a preponderance of the evidence. *See International Brotherhood of Teamsters v. United States* [14 EPD P 7579], 431 U.S. 324, 360 (1977), where the Court stated: "at the initial

'liability' stage of a pattern or practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." Thus, the issue before the Court may be stated as follows:

> Whether the defendant's hiring, promotion and salary practices constitute patterns or practices of discrimination based on sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.[1]

The Court resolves this issue in favor of the defendant. The Court recognizes that statistics can make out a prima facie case of employment discrimination. However, the Court finds that the conclusions of the respective statistical studies conducted by the parties' experts are misleading due to a failure to define adequately the relevant labor market from which the Agency draws for qualified personnel. In addition, the plaintiffs' evidence concerning individual instances of discrimination is not persuasive. Accordingly, the Court finds, as hereinafter more particularly set forth, that the plaintiffs' have failed to carry their required burden of proof by a preponderance of the evidence. Additionally, it appears that the Agency has done, and continues to do, all it can to eliminate any pattern or practice of disparate treatment or discrimination on the basis of sex. In accordance with

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[1] The defendant concedes that the merits of the individual Title VII cases that have been consolidated herein may still have to be addressed at a later proceeding before the Court. See, Defendant's Supplemental Post-Trial Memorandum and Conclusions of Law, at 2, n.1 (filed July 18, 1979).

the foregoing, the following constitutes the Court's findings of fact and conclusions of law.

II. Finding of Fact

A. The Statistical Evidence of the Parties Fails Adequately to Define the Relevant Labor Market From Which the Agency Draws Qualified Personnel.

1. Plaintiffs have sought to support their Title VII claims through the testimony of Dr. Marc Rosenblum. Dr. Rosenblum is a consulting labor economist by profession and training. He holds a Ph.D. in industrial relations and has worked on more than twenty-five (25) employment discrimination cases as an expert witness.

2. The statistical analysis conducted by Dr. Rosenblum here involved a three-step process.

First, Dr. Rosenblum correlated ("crossmapped") the U.S. Civil Service Commission titles, (*i.e.*, the job categories used by the Agency), with the various job categories used by the U.S. Bureau of the Census.[2]

Second, Dr. Rosenblum focused on fourteen (14) major occupational categories within the Agency, as identified by the Agency Affirmative Action Plan for Fiscal Year 1978, pages B-15, 16, to determine whether women have been underutilized by the Agency in any of those major categories. The categories examined include seventy-five percent (75%) of the jobs at the Agency. He compared the proportion of women within each of these for categories, based on

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[2] Alphabetical Index of Industries and Occupations, U.S. Department of Commerce, Bureau of the Census; issued June, 1971.

data provided by the defendant, with the proportion of women available in the relevant labor market, based on data provided by the Bureau of Labor Statistics, United States Department of Labor (*i.e.*, the United States Department of Labor, Bureau of Labor Statistics' annual averages for the year 1978[3]). This witness claimed that there was a statistically significant underutilization of women in six (6) major job categories.

Third, Dr. Rosenblum calculated the number of expected female employees in each of the six (6) job categories, assuming the Agency's hiring practices were free of sex discrimination. To derive the number of expected female employees, the proportion of women available in the relevant labor market in each of these job categories was applied to the total number of Agency employees within the same job categories. The difference in the number of women employed in each job category within the Agency and the number "expected" was then measured by the statistical technique of standard deviation analysis. Next, the standard deviation was translated into a probability that such a difference could have occurred by chance. Under customary scientific practice, 1.65 standard deviations, means that there is 0.05 or five (5) chances in one hundred (100) that such a difference occurred by chance, but this does not mean, based upon all the evidence here, that the difference was caused by any discrimination on account of sex.

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[3] Employment and Earnings, U.S. Department of Labor, Bureau of Labor Statistics, 1978 annual averages, Vol. 26, No. 1, January, 1979.

3. Dr. Rosenblum also claimed that there was statistically an underutilization of women in six (6) major job categories. Further, he asserted that the probability of such underutilization occurring by chance was less than 0.05 in all six (6) categories. These six (6) categories are: 1) Electronic Technician, 2) Foreign Language Broadcaster, 3) Production Specialist, 4) Writer/Editor, 5) Foreign Information Specialist, and 6) Radio Broadcast Specialist. However, for the reasons hereinafter discussed, the Court finds that Dr. Rosenblum's conclusions are entitled to, based upon a consideration of the record as a whole and his credibility as a witness, little probative value or weight.

[Defendant's Expert]

4. Dr. Seymour Wolfbein testified as an expert labor economist on behalf of the defendant Agency. Dr. Wolfbein is a nationally recognized manpower expert, with wide experience in the fields of manpower utilization, labor employment patterns and labor statistics.

5. Dr. Wolfbein utilized an approach and methodology quite different from that of Dr. Rosenblum's. The type of analysis performed by Dr. Wolfbein was more relevant to the issues within the case but still deficient in determining whether there was a pattern or practice of discrimination against women at the defendant Agency because of the inherent difficulties involved here.

Dr. Wolfbein first grouped ("crossmapped") the occupational activities at the Agency (professional, managerial and clerical), for which data was available from October, 1969 through December, 1978, into

standard occupational classifications, using the most similar job categories prepared by the U.S. Bureau of the Census.[4] However, the job categories used as compared with the jobs in issue at the Agency simply do not match. Since the class herein is an agencywide class consisting of women in all employment categories, Dr. Wolfbein thought it essential that he analyze all such categories at the Agency, which Dr. Rosenblum did not do. The date of October, 1969, was selected as a starting point since that was the date nearest to the 1970 Decennial Census for which data on all job categories was available from the Agency (with the exception of the blue collar field, for which data was available as of June, 1975).

Dr. Wolfbein first compared the Agency's utilization of women in each of these Census categories with the level of their availability in the external labor market, according to the 1970 Census. Comparisons were made with the United States as a whole in the professional and managerial fields and with the District of Columbia Standard Metropolitan Statistical Area for the remainder of the occupations.

6. Defendant accurately summarized Dr. Wolfbein's testimony as follows:

> In terms of the statistical exercise being performed, I would say unequivocally, . . . that this is a picture of an agency which does not underutilize women across the board . . . To put it more positively, it shows a pattern and a practice, in terms of hiring, assignment, promotions, in which the utilization of women meets accepted labor market practice in America statistically.

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[4] *Supra*, n.2.

See, Defendant's Proposed Supplemental Findings of Fact, at 26, (filed June 21, 1979). See also Tr. 53-54, June 1, 1979.

Specifically, Dr. Wolfbein proffered to this Court that the Agency's utilization of women is slightly above its external labor market in professional personnel (19.1% vs. 18.5%) and clerical personnel (82.3 vs. 81.3%), and well above its labor market for managerial personnel (25.2% vs. 15.0%). However, for the reasons hereinafter discussed, the Court finds that Dr. Wolfbein's conclusions, although entitled to much more weight than plaintiffs' expert witness, are not dispositive of the case either. (*See* Findings of Fact #13 and #14).

7. The relevant external labor market for professional employees at the Agency is the nationwide labor market, but the fact remains that there is no national or even local statistical data which matches those job categories at the Agency and the specific requirements thereof.

[Class Modification]

8. The Court notes that Dr. Rosenblum focused on women in several occupations at the professional levels of the Agency. Comparison of the Agency's utilization of women in the clerical positions with their availability in the relevant labor market does not provide a meaningful analysis in light of the traditional predominance of women in these occupations and the scope of the plaintiff's complaint. The plaintiffs do not quarrel with the defendant's position that women in the lower clerical levels are over-represented. Based upon this finding of fact and the record considered as a whole, the Court finds its conditional cer-

tification of all women at the Agency as a class was erroneous because the evidence adduced dealt basically, if not only, with the women in the highly technical and specialized fields at the Agency. Accordingly, the class will be modified so as to include all women who have applied for employment with, or are currently employed by, the Agency, other than those in clerical positions.

9. At first glance, using the plaintiffs' classification titles, it would appear there are disparities between the women employed at the Agency and the external labor pool of 1) Electronic Techicians, 2) Radio Broadcast Techicians, 3) Writers/Editors, and 4) Foreign Information Specialists.

10. However, the apparent agreement as to the results between the testimony of the experts concerning the employment of women in these highly specialized fields is, nonetheless, misleading. Both statistical studies require the parties' experts to engage in "cross-mapping", that is, the comparison of figures for job titles defined by different organizations, including the U.S. Civil Service Commission and the U.S. Bureau of the Census, which are different in label as well as job content and requirements. The job categories used by the parties' experts do not correspond with the jobs in the defendant Agency. Neither do plaintiffs' nor defendant's experts adequately explain that the tasks actually performed by the employees at the Agency, in the job categories analyzed, correspond in any more than a very general and speculative way to those utilized by the parties' experts.[5]

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[5] *Supra*, n.2

11. Cross-mapping of actual employee activities for purposes of comparison with statistics concerning available labor pools is appropriate and useful where the inquiry is of general non-specialized skills. While statistics are helpful and useful in many cases, it must be understood that it cannot be argued or found in this case that precise labor pool availability figures can be derived to determine the number of females available for employment in such specialized fields as, for example, Cambodian language news analyst/writer/broadcaster. The Court finds that both plaintiffs' and defendant's experts have failed to produce sufficiently precise labor-pool-availability figures either nationally or locally. Due to the inherent unreliability of broad and general cross-mapping with a specialized variety of highly-skilled positions at the Agency as compared to the available Census and BLS job categories, the "cross-mapping" done here is of little or no value in the case at bar.

B. The Evidence of Individual Instances of Discrimination Is Not Persuasive.

The plaintiffs' case would be more persuasive if the evidence of individual instances of discrimination had been made clear. While several of plaintiffs' witnesses may have been well-qualified for the positions for which they applied (*e.g.*, Ms. Kobylinski), the qualifications of most of them are very debatable at best. For example, Ms. Debbie Showalter, a GS-4 secretary with the Voice of America, repeatedly failed a qualifying examination for employment as a writer with the Agency, administered anonymously by the Personnel Department.

Ms. Etel Berger, who contracted with the Voice of America as a purchaser-order vendor for the Brazil-

ian Branch of the Latin American Division in 1960 and worked continuously as a writer-translator-broadcaster for the VOA until 1978, repeatedly requested her supervisor to hire her as a full-time employee. However, the evidence indicates that she exhibited slowness in completing work assignments and lacked currency in the Portuguese language at the time of her employment.

Ms. Patricia DeLovely, who is employed by the Agency as a GS-14 budget officer in the Central Budget Office, applied for two newly created GS-15 positions within the Central Budget Office. Ms. DeLovely admitted that the person selected for the position she sought was more qualified than she, even discounting for training the selectee received.

Ms. Dorothy Slak, who had been employed by the Agency and its predecessors as a Foreign Service Information Officer for more than twenty (20) years, claims that her grade level (FSIO-4) is well below that of the vast majority of her male counterparts, and her job assignments have allegedly been made on the basis of sex. However, the evidence clearly indicates she was incapable of administering her post in Yugoslavia and generally exhibited poor performance in the later stages of her career in the Foreign service.

Ms. Luba Medina was employed by the Voice of America from 1971 to 1974 when she resigned from the Agency due to undiagnosed health problems. Since her recovery, she has applied for employment with the Agency in several positions but has been rejected. Again, the evidence is clear and convincing that Ms. Medina was unqualified for two positions and tested poorly for a third.

Finally, Ms. Carolee Hartman, the original plaintiff in this case, complains that she should have been considered and hired for a GS-11/12 writer/editor position on Horizons Magazine, one of several publications of the Agency. Both Ms. Dorothy Crook, then Editor of Economic Impact, another Agency publication, and Mr. Robert Korengold, then Editor of Horizons Magazine, testified that Ms. Hartman could not have been seriously considered for the position as she did not possess sufficient professional journalism experience. The Court conclusively accepts the testimony of Ms. Crook and Mr. Korengold on this matter.

[Assertions Controverted]

2. Plaintiffs also proffered testimony concerning the atmosphere of discrimination at the Agency. However, the plaintiffs' evidence is far from uncontroverted. Several witnesses, who are members of the class occupying positions of responsibility at the Agency, testified on behalf of the defendant that they had neither perceived, nor experienced, employment practices which were designed to discriminate against, or preclude, the advancement of women in any manner. Many in fact testified that the opposite was true. In addition to this very credible testimony, the fact that these women have attained the positions they now occupy, and have done so by rapid and consistent advancement, is dispositive of the absence of any pattern or practice of discrimination based on sex at the Agency at all relevant periods in this litigation.

For example, Ms. Jane Grymes described her steady advancement in the secretarial career field and, when she reached the top of that field, her move into the administrative career field and subsequent advancement to a GS-14 Management Analyst.

Furthermore, Ms. Juliet Antunes testified convincingly regarding the Agency's commitment to the principles of Equal Employment Opportunity (EEO). As head of the EEO office of the Agency during 1976 and 1977, she described the substantial progress the Agency had made in areas of recruitment, upward mobility, training, minority participation on promotion panels and EEO screening of assignments to the senior levels of the Foreign Service. Laudable examples of such accomplishments by the defendant are the broadcasters intern program, the "new careers" program (designed to stimulate advancement of secretarial employees into mid-level administrative positions), visits to colleges with a predominant minority enrollment and several training programs specifically designed to upgrade the position of women in the Agency workforce.

Ms. Antunes also testified to and described the very small number of EEO complaints coming to her attention while she was Director of the Agency's EEO office. The Court finds her a most credible witness and her testimony persuasive.

III. Discussion

In order for a plaintiff to prevail in a Title VII class action, a prima facie case of discrimination must first be proved by a preponderance of the evidence. The burden then shifts to the defendant to attempt to refute the plaintiffs' prima facie case if established. *McDonnell Douglas Corp. v. Green* [5 EPD P 8607], 411 U.S. 792 (1972), *Furnco Construction Corp. v. Waters* [17 EPD P 8401], 438 U.S. 567 (1978).

While it is well established in employment discrimination law that statistics can make out a prima facie

case in individual Title VII cases or in class actions, it is also well settled that they are not irrefutable and their usefulness depends on all of the surrounding facts and circumstances. As the Supreme Court cautioned in *International Brotherhood of Teamsters v. United States* [14 EPD P 7579], 431 U.S. 324, 340 (1977), statistics "come in infinite variety and, like any other kind of evidence, they may be rebutted."

[Failure of Proof]

Here, upon consideration of the record as a whole, the credibility of witnesses and vague statistical data and so-called job comparisons, it is clear that the statistics and data proffered by the parties are of little usefulness.

In this particular case, the statistics suffer from the following deficiency, as noted by the Supreme Court in Teamsters: imprecise definitions of the relevant labor market when particular qualifications are required for the job(s) in question. 431 U.S. at 339 n. 20.

The relevant labor market is that market from which the employer draws its employees. *United States v. Ironworkers Local* 86 [3 EPD P 8213], 443 F.2d 544 (9th Cir. 1971) *cert. denied*, 404 U.S. 984 (1971). In *Hazelwood School District v. United States* [14 EPD P 7633], 433 U.S. 299 (1977), the Court indicated that statistics comparing the employer's work force and the relevant labor market must be based on the labor pool truly relevant to the employer's potential work force. Clearly, the labor market must include only those persons qualified to perform the employer's tasks, within the relevant area and over the appropriate time period.

As indicated in this Court's findings of fact, the process of defining the relevant labor market for the Agency's potential work force is inherently difficult because of the special qualifications required of the Agency's employees. Indeed, the Court has found that the parties' experts have failed to define adequately the relevant labor market from which the Agency draws qualified personnel. As a result, the statistical studies conducted by the experts have little probative value. As the case of *Hazelwood School District, supra*, indicates, statistical analysis based on the available labor pool is inadequate without precise definition of the relevant labor pool. This statistical analysis and data in evidence here, based on the experts' "cross-mapping," fails to produce the required precision due to the special qualifications and highly specialized skills involved in this case, and, therefore, does not support a finding of a pattern or practice of discrimination by the Agency on the basis of sex.

While the plaintiffs' case rests primarily on Dr. Rosenblum's study, the plaintiffs presented some individual testimony concerning employment discrimination at the Agency. However, as the findings of fact make clear, this testimony was so unpersuasive as to make it impossible for the Court to infer class-wide discrimination. In addition, the defendant introduced compelling, credible testimony from women currently employed at the Agency indicating an absence of any policy, pattern or practice of discrimination at the Agency on the basis of sex.

In sum, the Court finds the plaintiffs have failed in their burden of proof.

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IV. Conclusions of Law

1. This Court has jurisdiction under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(c).

2. The class as conditionally certified herein be, and the same hereby is, modified so as to include all women who have applied for employment with, or are currently employed by, the Agency, other than those in clerical positions.

3. The plaintiff-class has not established a prima facie case of discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

V. Conclusion

In accordance with the foregoing, the Court finds that the plaintiffs have failed to establish by a preponderance of the evidence an agency-wide pattern or practice of discrimination on the basis of sex. Accordingly, the Court dismisses the class claim against the defendant Agency. An order and judgment in accordance with the foregoing will be issued of even date herewith.

Order

Upon consideration of the entire record herein, and in accordance with the Findings of Fact and Conclusions of Law of even date herewith, it is, by the Court this 24th day of October, 1979,

Ordered, that the class as conditionally certified herein be, and the same hereby is, modified so as to include all women who have applied for employment

with, or are currently employed by, the Agency, other than those in clerical positions; and it is

Further ordered, that the class claims in these consolidated proceedings against the defendant shall be, and the same hereby are, dismissed in accordance with the terms of the Findings of Fact and Conclusions of Law of even date herewith; and it is

Further ordered, that judgment on the class claim shall be, and the same hereby is, entered for the defendant, without costs to the plaintiffs.

APPENDIX D

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 81-1909 to 81-1911

LUBA S. KOWALYSZYN DE MEDINA, APPELLANT

v.

JOHN E. REINHARDT, DIRECTOR, UNITED STATES INTERNATIONAL COMMUNICATION AGENCY, ET AL.

CAROLEE BRADY HARTMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, ET AL.,
ROSE KOBYLINSKI AND LUBA MEDINA, APPELLANTS

v.

JOHN REINHARDT, DIRECTOR, UNITED STATES INTERNATIONAL COMMUNICATION AGENCY

TOURA KEM, LUBA MEDINA AND ROSE KOBYLINSKI, APPELLANTS

v.

JOHN REINHARDT, DIRECTOR, UNITED STATES INTERNATIONAL COMMUNICATION AGENCY

[Filed: Aug. 27, 1982]

Before WRIGHT and WALD, Circuit Judges and ANTHONY J. CELEBREZZE,* Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion for the Court filed by Circuit Judge WALD.

Opinion concurring in part and dissenting in part filed by Senior Circuit Judge CELEBREZZE.

WALD, Circuit Judge:

These appeals contest the district court's dismissal of consolidated individual and class sex discrimination claims against the Director of the United States International Communication Agency ("ICA" or "Agency"), formerly the United States Information Agency. Appellants contend that the district court (1) evaluated under inappropriate legal standards the statistical and testimonial evidence of a pattern and practice of discrimination in hiring, (2) failed to make required fact findings on the class promotion discrimination and retaliation claims, (3) improperly dismissed an individual claim for failure to exhaust administrative remedies, and (4) misapplied the requirements for a *prima facie* showing of discrimination to another individual claim. We find merit in certain of appellants' objections and therefore remand the class claims and the individual claim of Rose Kobylinski for further consideration. We affirm, however, the district court's dismissal of Luba Medina's individual claim.

I. Background

In March 1977, Luba Medina, a former Agency employee, filed an individual claim for damages and declaratory and injunctive relief under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-2000e-17. Her complaint alleged that, since 1974, the Agency had refused to rehire her in retalia-

tion for her own prior charges of sex discrimination and her husband's work on behalf of Agency minority employees. She also claimed that she had personally suffered from the Agency's discriminatory practices against the foreign-born and women. In late 1977, another job applicant, who had been denied employment by the Agency earlier in the year, filed a Title VII class claim on behalf of female applicants and employees against whom the Agency had discriminated in hiring and promotion. In April 1978, the class was conditionally certified "to include all women who have applied for employment with or are currently employed by the United States Information Agency and who have been or continue to be adversely affected by the discriminatory employment practices of the defendant." Joint Appendix ("J.A.") at 22. Later that month, an Agency contract employee filed a complaint charging that she had been denied a permanent Agency position on account of sex. In November the three cases were consolidated. In the interim, the district court had permitted Medina and two Agency employees, Josefina Martinez and Rose Kobylinski, to intervene as named plaintiffs and had allowed plaintiffs to supplement the class complaint to include a claim that the Agency maintained "a practice of reprisals against women who have filed sex discrimination charges against the Agency." J.A. at 28. On April 19, 1979, plaintiffs filed a motion for preliminary injunction to enjoin the defendant "from taking any retaliatory action against individuals who oppose the defendant's discriminatory practices or otherwise exercise their rights under Title VII." On May 16, the motion was denied orally without prejudice.

The parties agreed to bifurcate trial of the class claims into "liability" and "remedial" stages,[1] and a bench trial on liability was conducted from May 29, 1979 through June 5, 1979. On October 24, 1979, the district court issued an opinion and order which redefined the class to exclude women in clerical positions and dismissed the class claims. *Medina v. Reinhardt*, Nos. 77-0360, 77-2019 & 78-0762 (D.D.C. Oct. 24, 1979) (*Medina I*), J.A. at 68.

Plaintiffs filed appeals on December 21, 1979, but on September 19, 1980, this court dismissed the appeals under Fed.R.Civ.P. 54(b)[2] because the residual

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[1] At the initial, "liability" stage of a pattern-or-practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. [Plaintiffs'] burden is to establish a prima facie case that such a policy existed. . . .

If an employer fails to rebut the inference that arises from the [plaintiffs'] prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. . . . (A) court's finding of a pattern or practice justifies an award of prospective relief. . . .

When the [plaintiff] seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 360-61, 97 S.Ct. 1843, 1867, 52 L.Ed.2d 396 (1977).

[2] **Judgment upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are

individual claims remained to be heard. Three of the named plaintiffs voluntarily dismissed their individual claims, and trial of Medina's and Kobylinski's claims was conducted on December 15 and 16, 1980. On June 15, 1981, the district court rendered its decision dismissing Medina's claim on the merits and Kobylinski's claim because she had failed to exhaust her administrative remedies. *Medina v. Reinhardt*, Nos. 77-0360, 77-2019 & 78-0762 (D.D.C. June 15, 1981) (*Medina II*), J.A. at 118. This appeal followed.

II. The Class Claims

Although the district court's "Findings of Fact" discussed rebuttal evidence as well as evidence introduced by plaintiffs to establish their threshold case, the court ruled in its "Conclusions of Law" that the plaintiff class had failed to establish "a *prima facie* case of discrimination on the basis of sex," *Medina I* at 13, J.A. at 80. The court's conclusion rested primarily on rejection of both parties' statisti-

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involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

28 U.S.C. rule 54(b).

cal studies on hiring patterns as "misleading due to a failure to define adequately the relevant labor market from which the Agency draws for qualified personnel," *id.* at 3, J.A. at 70. The court's objection was that the Census occupational categories used for comparison "with the jobs in issue at the Agency simply do not match." *Id.* at 6, J.A. at 73. We find, however, that the district court's opinion reflects a basic misperception of the relevancy and role of statistical evidence in the plaintiffs' *prima facie* showing; hence, we remand for a redetermination of whether plaintiffs can make out a *prima facie* case of sex discrimination. Further, we must remand because the court made no findings or comment on plaintiffs' evidence of Agency reprisals against women asserting their rights under Title VII.

Had the court credited either appellants' or appellee's definition of the relevant labor market, it would have found "disparities between the women employed at the Agency and the external labor pool of (1) Electronic Technicians, (2) Radio Broadcast Technicians, (3) Writers/Editors, and (4) Foreign Information Specialists." *Id.* at 8, J.A. at 75. In 1977, when the class action was initiated, these four categories accounted for a major part of the Agency's non-clerical positions. *See, e.g.*, United States Information Agency FY-1978 Affirmative Action Report (Plaintiff's Exhibit No. 22(b)). Consequently, on remand, the district court should reconsider whether these disparities alone or in combination with testimonial evidence[3] are sufficient to raise an inference of

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[3] Plaintiffs introduced two types of testimonial evidence: (1) witness accounts of Agency rejection of their job applications upon which they sought to raise an inference of discrimi-

discrimination in hiring and, if so, whether that inference was adequately rebutted. Upon remand, the court should also address the class retaliation claim.

A. *Relevant Labor Market*

The 1972 amendments to the Civil Rights Act of 1964 came in response to the "persistence of discrimination" and the consequent need for more effec-

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natory motive, and (2) direct evidence of discriminatory motive (*e.g.*, testimony that an interviewer told a job applicant that "he wanted to fill the position with a man," Tr. at 35; J.A. at 137). Appellants protest that the court improperly focused on witness job qualifications in evaluating the second type of testimony. We do not read the opinion that way. The court held that "the evidence of individual instances of discrimination had [not] been made clear. While several of plaintiffs' witnesses may have been well-qualified for the positions for which they applied (*e.g.*, Ms. Kobylinski), the qualifications of most of them are very debatable at best." *Medina I* at 9, J.A. at 76. The court thus did not infer a pattern or practice of discrimination from the evidence that these women had been denied employment or promotion. To the extent that a witness attempts to establish that an Agency decision not to hire or promote her was motivated by sex discrimination (the first type of testimonial evidence), the qualifications of the witness bear on whether the Agency personnel decision was based on legitimate rather than discriminatory reasons. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44, 97 S.Ct. 1843, 1866 n.44, 52 L.Ed.2d 396 (1977); *Presseisen v. Swarthmore College*, 442 F.Supp. 593, 601 (E.D.Pa.1977), *aff'd*, 582 F.2d 1275 (3d Cir. 1978). The court dealt with the second type of testimony by observing that the "testimony concerning the atmosphere of discrimination at the Agency" had been controverted by testimony of defendant's witnesses that "they had neither perceived, nor experienced, employment practices which were designed to discriminate against, or preclude, the advancement of women in any manner." *Medina I* at 10-11, J.A. at 77-78.

tive enforcement. H.R.Rep.No.238, 92d Cong., 1st Sess. 3 (1971), U.S.Code Cong. & Admin.News 1972, p. 2137. The legislative history particularly focused on the seriousness of sex discrimination, *id.* at 4-5, and explicitly recognized the need "(t)o correct . . . entrenched discrimination in the Federal service." *Id.* at 24, U.S. Code Cong. & Admin. News 1972, p. 2159. It is noteworthy that Congress itself relied on "statistical evidence" to prove the existence of sex discrimination in higher level government jobs.

> Statistical evidence shows that minorities and women continue to be excluded from large numbers of government jobs, particularly at the higher grade levels.
>
> * * * * *
>
> This disproportionate distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity.

Id. at 23, U.S.Code Cong. & Admin. News 1972, p. 2158. *See* S.Rep.No.415, 92d Cong., 1st Sess., 421-23 (1971). Congress thus extended to federal employees the right to bring individual and class actions under Title VII.

In a Title VII suit, the claimant "carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that . . . the employer is treating 'some people less favorably than others because of their race, color, religion, sex or

national origin.'" *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 576-77, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977)). When a plaintiff submits sufficient evidence to *permit* such an inference, Title VII gives it the status of a "legally mandatory, rebuttable presumption." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7, 101 S.Ct. 1089, 1094 n.7, 67 L.Ed.2d 207 (1981). Because unlawful discriminatory intent is typically elusive of direct proof, Congress has deemed it appropriate to then require an explanation of the defendant.

In a sex discrimination class action charging disparate treatment, appropriate statistical comparisons may be used to indicate whether similarly situated men and women have been treated similarly, *see, e.g., Valentino v. United States Postal Serv.* (*USPS*), 674 F.2d 56, 69 (D.C.Cir.1982) (quoting *Valentino v. United States Postal Serv.*, 511 F.Supp. 917, 940 (D.D.C.1980)), and, if not, whether the difference in treatment shown supports an inference of discriminatory intent. *See, e.g., Teamsters*, 431 U.S. at 325 n.15, 97 S.Ct. at 1854 n.15. Where specialized skills are legitimately required for employment, "(t)he proper comparison is between the composition of the (employer's) work force and the qualified population." *Davis v. Califano*, 613 F.2d 957, 963 (D.C.Cir.1979) (As Amended Feb. 14, 1980). *See Valentino v. USPS*, 674 F.2d at 68. ("When the job qualifications involved are ones that relatively few possess or can acquire, statistical presentations that fail to focus on those qualifications will not have large probative value.") We have recently restated, how-

ever, that not every conceivable qualification for every separate job must be taken into account in making out a *prima facie* class claim of discrimination: "[T]he qualifications a Title VII plaintiff must grapple with . . . are threshold or 'minimum objective' qualification." *Id.* at 71 n.24 (quoting *Davis v. Califano*, 613 F.2d at 964)). Thus, plaintiffs must identify the population likely to possess the minimum objective qualifications required of Agency employees (the relevant labor pool) and compare the proportion of women in that population with the proportion of women employed in the Agency. The comparisons in turn must show disparities of sufficient magnitude that they are statistically unlikely to have occurred by chance. We are then entitled to assume that "absent discriminatory employment practices, the proportion of the protected group in each of the job classifications and grade levels would approximate the proportion of the protected group with the minimum necessary qualifications . . . ." *Id.* at 964. *See, Teamsters*, 431 U.S. at 339 n.20, 97 S.Ct. at 1856 n.20. Thus, statistically significant disparities between the composition of an employer's work force and the labor pool from which the employer draws indicate that similarly situated people have been treated differently and "alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977).

Here, because the district court did not reach the issue, we have no occasion to consider whether the magnitude of the statistical disparities shown was adequate to infer discriminatory motive. We are

concerned in this appeal only with whether there is "a basis for a reasonable assumption" that the comparison population was qualified for Agency positions. *Metrocare v. Washington Metropolitan Area Transit Auth. (WMATA)*, 679 F.2d 922, 930 (D.C.Cir.1982). In this case, the experts testifying on both sides proceeded through trial on the assumption that the population sufficiently well-qualified to be employed in Agency occupational categories was the population employed in those same occupations outside the Agency. We think this is a reasonable threshold assumption which follows from the Supreme Court's reasoning in *Hazelwood School Dist. v. United States*. In *Hazelwood*, a school district was charged with racial discrimination in teacher hiring, and United States Census data recording employment in the relevant occupational categories were used to calculate the disparities that formed the basis for plaintiffs' *prima facie* case. The Supreme Court specifically approved the technique, noting that "[t]he comparative statistics . . . were properly limited to public school teachers, and therefore this is not a case . . . in which the racial-composition comparisons failed to take into account special qualifications for the position in question." 433 U.S. at 308 n.13, 97 S.Ct. at 2742 n.13. Thus, *Hazelwood* established that the proportion of a protected group actually *employed* elsewhere in the relevant occupation(s) is a meaningful measure of the proportion of the protected group *qualified* for employment by the defendant. The district court's opinion here, however, raises the question whether there is too much diversity within the occupations involved in this case to permit reliance on the *Hazelwood* assumption as a basis for the plaintiffs' *prima facie* showing. The district

court concluded that the Census data used by the experts on both sides here was not sufficiently reflective of the qualifications required for Agency positions. The court insisted on "statistical data which *matches* those job categories at the Agency and the specific requirements thereof," *Medina I* at 7, J.A. at 74 (emphasis supplied), and concluded in its "Findings of Fact":

> 10. . . . The job categories used by the parties' experts do not correspond with the jobs in the defendant Agency. Neither do plaintiffs' nor defendant's experts adequately explain that the tasks actually performed by the employees at the Agency, in the job categories analyzed, correspond in any more than a very general and speculative way to those utilized by the parties' experts.
>
> 11. Cross-mapping of actual employee activities for purposes of comparison with statistics concerning available labor pools is appropriate and useful where the inquiry is of general non-specialized skills. While statistics are helpful and useful in many cases, it must be understood that *it cannot be argued or found in this case that precise labor pool availability figures can be derived to determine the number of females available for employment in such specialized fields as, for example, Cambodian language news analyst/writer/broadcaster.*

Id. at 8-9, J.A. at 75-76 (footnote omitted) (emphasis supplied).

While definition of the relevant labor market is normally reviewable under the "clearly erroneous" standard as an "essentially factual matter within the special competence of the district court," *Castaneda v. Pickard*, 648 F.2d 989, 1003 (5th Cir. 1981); *see Hazelwood*, 433 U.S. at 312-13, 97 S.Ct. at 2744, "if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, — U.S. ——, —— n.15, 102 S.Ct. 2182, 2189 n.15, 72 L.Ed.2d 606 (1982). A close scrutiny of the legal underpinnings of the district court's fact finding is appropriate here because the court's decision was expressly based on its interpretation of the standard of proof enunciated in *Hazelwood* and *Teamsters*. The district court observed that *Hazelwood* "indicated that statistics comparing the employer's work force and the relevant labor market must be based on the labor pool *truly relevant* to the employer's potential work force," and concluded that "the statistics suffer from the following deficiency, as noted by the Supreme Court in *Teamsters*: Imprecise definitions of the relevant labor market when particular qualifications are required for the job(s) in question." *Medina I* at 12, J.A. at 79. We conclude, however, based on our examination of these cases, that the standard of precision the district court demanded, far from being mandated by these cases, is unprecedented and unjustifiable, insofar as it results in a total rejection of the Census data as a basis for statistical comparisons to establish a *prima facie* case.

The methods employed in this case by the experts on both sides to identify Census categories com-

parable to Agency positions, in fact, closely track that adopted in *Hazelwood* and by other courts, *see, e.g., Rivera v. City of Wichita Falls*, 665 F.2d 531 (5th Cir. 1982); *Croker v. Boeing Co. (Vertrol Div.)*, 437 F.Supp. 1138 (E.D.Pa.1977), *aff'd*, 662 F.2d 975 (3d Cir. 1981). Both experts subdivided the Agency work force into occupational categories and sought to translate each Agency category into Census terminology ("cross-map") by reference to the U. S. Department of Commerce, Bureau of the Census, Alphabetical Index of Industries and Occupations (1971) (Defendant's Exhibit No. 2) which lists "approximately . . . 23,000 occupation titles in alphabetical order." *Id.* at iii. The Alphabetical Index explains the design of the Census classification system which groups those titles under some 440 occupational categories. Each category includes all the titles considered to be part of the same occupation.

> To organize and make understandable the information relating to the many thousands of industries and occupations, a system of homogeneous grouping or classification must be used. Homogeneous titles are grouped together to form the various categories which comprise the system. . . . In this Index each title is identified by the code for that category to which it is assigned.

For example, plaintiffs' expert explained the composition of the Census category "Editors and Reporters."

> Census Code 184, covering editors and reporters, is a list of about 100 titles which all fit into a journalistic type of occupational group, including just, for example, editor, feature writer, foreign

> correspondent, newspaper writer, and newspaper editor.

Trial Transcript ("Tr.") at 82 (May 29, 1979) (testimony of M. Rosenblum).

The defendant's expert testified that in the "overwhelming majority of occupations" cross-mapping is accomplished by looking up the Agency position title in the Index and identifying the Census category to which it belongs. Tr. at 19 (June 1, 1979) (testimony of S. Wolfbein). Where relevant Agency job titles were not included in the Alphabetical Index, defendant's expert testified that he translated Agency categories into Census terminology based on job descriptions provided by the Agency. Tr. at 23 (June 1, 1979) (testimony of S. Wolfbein). Plaintiffs' expert testified that he consulted job descriptions in order to cross-map all the relevant positions.

> I consulted the 118 Manual to read the job description, as published by Civil Service, covering those Civil Service titles and codes that are used by all federal agencies.
>
> In a number of these instances I also consulted material published by the Agency, itself, to augment and fill in additional descriptions.
>
> So that I got a better sense in my own mind of specifically which Census occupational category would be appropriate for this cross-mapping exercise.

Tr. at 83 (May 29, 1979) (testimony of M. Rosenblum). Plaintiffs' expert testified that he also consulted an Office of Personnel Management ("OPM") study that translated white collar civil service jobs into Census

terms, although he disagreed with OPM's cross-mapping in one instance.

Because the Census has fewer occupational categories (approximately 440) than the more detailed Civil Service system (over 1,000), the cross-mapping necessarily involved fitting some Agency occupational categories at issue in the class action into broader Census categories. For example, based on Census coding, the defendant's expert placed both the Agency positions entitled "Radio Broadcast Technician" and "Electronic Technician" in the Census category entitled "Electrical and electronic engineering technicians." Tr. at 20, 93-94 (June 1, 1979) (testimony of S. Wolfbein). He also placed both "Writers/Editors" and "Foreign Information Specialists" in the Census category "Editors and Reporters." *Id.* 103-04. We are satisfied that comparing Agency occupational categories to the broader Census categories is appropriate because all types of jobs the Census includes within any given Census occupational category are subspecialties of that occupation; thus, such aggregations retain "generally similar job skills" in common. *Valentino v. USPS*, 674 F.2d at 68. ("The burden of comparing appropriate groups in terms of minimum objective qualifications, onerous here because of the disparate occupational categories involved, is far more tractable when all members of the class are professional, administrative or technical employees with generally similar job skills and seek [employment in or] advancement to positions involving those same skills."). Our conclusion is supported in this case by the more refined cross-mapping attempted where Agency occupations involved skills arguably reflected in more than one Census occupational cate-

gory. As we have pointed out, the experts *agreed* on the basic methodology involved in identifying the relevant labor pool although they disagreed as to which Census occupational category more properly encompassed certain Agency positions. As these disagreements came only in fine-tuning the comparisons, however, they do not deprive the statistics of probative value, but, in fact, enhance it since the disagreements caused the experts to focus on specific Agency job requirements and tasks and thus accomplish the cross-mapping with considerable attention to detail.[4] To the extent that the experts disagreed on

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[4] Plaintiffs' expert, for example, testified that he disagreed with defendant's expert on the classification of "Radio Broadcast Technician."

> Q ... [I]n the category "Civil Service Code 3940," which is listed as radio-broadcast technician, according to your Exhibit 35, you put it in the Census Code 171, radio operator.
>
> Is that correct?
>
> A That is correct.
>
> . . . .
>
> Q Did you consider the category 153, electronic technician?
>
> A I reviewed that category and did not believe that it as accurately represented the appropriate cross-mapping as the category I used.
>
> . . . .
>
> A number of the categories contain multiple references to occupations that are similar.
>
> The weight must fall on a more detailed analysis of the job descriptions and the related categories that entail similar work.

The difference between those categories essentially would fall into the idea that the Category 153, which its full title is "Electrical and Electronic Engineering Technician," is a more technical and more skilled occupation than the radio operator.

And an examination of the definition in the *Handbook of Blue-Collar Occupational Families* put out by the Civil Service Commission, the Agency's own qualification sheet for radio-broadcast technician, and the *Standard Occupational Classification Manual*, would, in fact, lead one to the conclusion, as it did me, that the appropriate cross-map for radio-broadcast technician is radio operator, rather than the engineer.

I could read to you the entire list within the classified index of occupations coming under the categories both electronic and electrical-engineering technicians 153 and radio operators 171.

But, just briefly, under radio operator 171, it includes broadcast engineer, control-records and tape-recordings engineer, field engineer, transmission engineer. That is several of them.

And if we look at the radio-operator group in the *Standard Occupational Classification Manual*, the description for that job family "includes occupations involving operating and maintaining radio equipment for communications with aircraft ships and other ground stations and transmitting radio and television broadcasts."

I would also suggest that the job description of the Agency's own qualifications sheet for radio-broadcast technician and the detailed descriptions described for category 3940, radio-broadcast technician, in the *Handbook of Blue-Collar Occupations*, published by the U. S. Civil Service Commission, would clearly indicate that we are talking about a radio operator, and not the more detailed and highly skilled electronic-engineering technician, which is Census Code 153.

the appropriate Census category to which Agency categories should be compared, we of course defer under the "clearly-erroneous" standard, *see* Fed. R. Civ. P. 52(a), to the district court's judgment as to which comparison has the *greater* probative value. And, we would not second-guess the district court as to other areas of disagreement between the experts which the court did not decide, *e.g.*, whether 1970 Census data or 1978 Labor Department data provided the appropriate set of figures. We decide only that the cross-mapping by both experts here provided an

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By Ms. Futch:

Q Is it then your testimony that, as a matter of professional judgment, you selected category 171 versus 153?

A Well, any time there is a difference in this kind of classification, it obviously would entail some professional judgment.

I believe a close reading of all of the evidentiary sources suggests that the category that I have selected is appropriate.

If we are looking at radio operator 171, let me read further from the *Handbook of Blue-Collar Occupational Families*, published by the Civil Service Commission, relating to radio-broadcast technician.

Some of these descriptions include duties of supervising or performing tasks associated with transmitters and antennas, broadcast studio consoles, radio and TV broadcasts, including starting up and shutting down the transmitter, adjusting tone and volume, monitoring through loudspeakers, headphones, or video, observing volume indicators, making minor repairs and changing parts, and keeping an operating log of the station.

That sounds to me pretty much like a radio operator.

Tr. 128-31 (May 29, 1979) (testimony of M. Rosenblum).

adequate basis from which to derive meaningful disparity figures in order to decide if a *prima facie* case of discrimination in hiring was made out.

A review of the statistical comparisons sanctioned in *Hazelwood* bolsters our conclusion that the district court imposed an inappropriately high standard of precision between Agency and Census job categories. The *Hazelwood* Court was satisfied with data that limited the relevant labor pool to those in the general Census occupational category of secondary school teachers although this data aggregated diverse teaching positions not subdivided on the basis of subject matter taught. Thus, the district court mistakenly relied on *Hazelwood* for authority that plaintiffs must provide data comparing the labor market for every combination of skills required in every one of the more than 2,000 Agency jobs at issue. We do not believe a plaintiff is required to prove that each individual in the comparison pool is qualified in every way for a particular Agency position. The objective is to define "a population that closely *approximates* the characteristics of those who would be *likely* to apply" and "meet legitimate threshold qualification requirements." D. Baldus & J. Cole, Statistical Proof of Discrimination 120 (1980) (emphasis supplied). The focus thus should be on whether the Census statistics give us a meaningful estimate of the proportion of women in the labor market reasonably likely to possess the minimum qualifications needed for the Agency jobs in question.

We agree with the district court that the ICA positions at issue are properly treated differently from the bulk of federal government jobs which are generally professional, administrative and managerial posi-

tions for which no differentiated training or educational standards are imposed as minimal qualifications. And we agree as well that the test was not met in a case like *Valentino*, where the statistics "did not group employees by job category," 674 F.2d at 70, nor "hone in on the wide variety of minimum objective qualifications required of applicants for the diverse . . . positions" at issue. *Id.* at 61. In *Valentino*, where discrimination in promotion was charged, it would indeed have been "irrational to assume 'equal qualifications' to fill engineering or secretarial vacancies," as the plaintiffs urged, simply because employees were "educated the same number of years and employed by the government for the same length of time." *Id.* at 71. *See also Metrocare v. WMATA*, 679 F.2d at 930 (no showing that "persons now holding secretarial or clerical jobs are qualified for [promotion to] managerial positions"). The data in this case, however, did hone in on the basic technical skills—"the *minimum objective qualifications*," *Valentino v. USPS*, 674 F.2d at 68 (quoting *Davis v. Califano*, 613 F.2d at 964)—prerequisite to employment in particular Agency occupational categories. The expert testimony reveals the comparisons of Agency and Census occupational categories were based on common job requirements and were accomplished in some instances with much greater precision than in *Hazelwood*. It should be noted again that in *Hazelwood* the comparison pool included public school teachers whether they taught, for example, natural science or a foreign language.

Therefore we do not deem it fatal to plaintiffs' *prima facie* case that the Census occupational data failed to take account of foreign language skills

prerequisite to employment in *certain* Agency positions. "[N]ot every conceivable factor relevant to [an employment] decision must be included in the statistical presentation . . . ." *Davis v. Califano*, 613 F.2d at 964. *See, e.g., Trout v. Hidalgo*, 517 F.Supp. 873 (D.D.C.1981):

> Certainly, plaintiffs' expert did not, in his analysis, account for each of the factors that the government suggests should have been considered. It is also true that a model which incorporated additional potentially relevant factors (such as type or quality of education and experience) would form a more perfect foundation for determinations regarding allegations of discrimination. However, *defendants have furnished no evidence that inclusion of the missing variables or refinement of others would have altered rejection of the hypothesis of no discrimination. Indeed, they failed to offer any evidence indicating that type of education and experience or quantity of experience per age was distributed unequally among . . . women and men in the . . . population.*

517 F.Supp. at 881 (emphasis supplied).

Here, many, if not most, of the jobs involved do not require foreign language skills at all.[5] Thus, to the extent that the district court rejected the statistics

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[5] *See Talev v. Reinhardt*, 662 F.2d 888, 893 (D.C.Cir.1981) (ICA's Worldwide English Division broadcasts for many more hours each day than foreign-language programs). In fact, one of the named plaintiffs applied for a Writer/Editor position which did not require foreign language skills. Tellingly, the defendant has not pointed to evidence, easily accessible to him, of the number of positions that would require specific foreign language skills.

for failure to account for such skills, the court imposed an additional and unnecessary requirement for a large number of Agency positions. Further, with respect to positions which include specific foreign language skills among the minimum objective qualifications (*e.g.*, "Cambodian language news analyst/writer/broadcaster"), the court articulated no basis for the assumption that such skills are in fact unevenly distributed between men and women generally or in the particular occupations involved. The more logical assumption, barring proof to the contrary, is that equal numbers of men and women possess skill in any given language; thus, the *proportion* of women qualified for Agency positions would not necessarily change if this variable were included in the occupational data. And, practically, statistical data, so far as we can tell from the record, are simply not available correlating 440 Census occupational categories with several dozen foreign language skills;[6] in their absence, we think it appropriate here to afford plaintiffs the benefit of a *rebuttable* presumption of an equal distribution of the relevant language skills.[7]

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[6] In contrast, in *Valentino*, the plaintiffs' expert did not submit qualification data that were available. *Valentino v. United States Postal Serv.* (*USPS*), 674 F.2d 56, 71 n.23 (1982) ("Valentino's statistical analyst had the occupational codes for USPS Headquarters employees at level 17 and above; he did not explain why he did not pursue analyses utilizing them.").

[7] The potential for injustice to the claimant argues for a reduced level of proof when relevant qualification data are unavailable; on the other hand, lowering the claimant's burden of proof increases the risk that the disproportionate impact observed in the record may be improperly attributed to the defendant's bias when it was caused by the application of legitimate selection criteria. Nevertheless, even if relevant variables are not accounted for in a plaintiff's proof, the

We underline that we are dealing here with the showing necessary for a prima facie case only. "In a Title VII case, the allocation of burdens and the

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disparities in treatment may be sufficiently large to raise legitimate questions about their cause.

Both equitable considerations and, in Title VII cases, the policy of the statute, support a rebuttable presumption of an equal distribution of qualifications between minority and majority group applicants when data are unavailable. The presumption should place on the defendant the burden of producing evidence from which it is possible to evaluate the likelihood that the disproportionate impact was caused by unequal qualifications. Possible sources of evidence include: (a) the defendant's recollection of prior applicants, (b) a random sample of potential applicants or the defendant's current applicants, (c) data on the qualifications of applicants processed by similarly situated decision makers, and (d) published work force or census data.

The justification for placing this burden on the defendant is threefold. First, it was the defendant's selection process that produced the observed disproportionate impact, and it is he who is alleging that it is the product of differential qualifications among the applicants. Moreover, the defendant has better access to data on the qualifications of applicants than does the plaintiff. Second, the equal qualifications assumption is often reasonable since many unqualified people are deterred from applying by knowledge of qualifications requirements. Third, in Title VII cases, the logic of the Act's underlying purpose, which places on an employer the burden of *justifying* an adverse impact produced by a neutral selection rule, suggests that an employer whose discretionary selection process produces a substantial disproportionate impact, whose proof takes into account all relevant qualifications on which data are reasonably available, should shoulder a similar burden of coming forward with evidence that *explains* those results or suffer the inference that it was intentionally caused.

D. Baldus & J. Cole, Statistical Proof of Discrimination 194-95 (1980).

creation of a presumption by the establishment of a *prima facie* case is intended *progressively* to sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 225 n.8, 101 S.Ct. at 1094 n.8 (emphasis supplied). Exactness is not required at the *prima facie* stage. As a consequence, in rebuttal, a defendant need only raise "a genuine issue of fact as to whether it discriminated" and need not even "persuade the court that it was actually motivated" by nondiscriminatory reasons. *Id.* at 254, 101 S.Ct. at 1094. The defendant here is certainly entitled to rebut plaintiffs' showing with evidence, more readily available to it than to plaintiffs, that, as to certain jobs with foreign language requirements, there are disproportionately fewer qualified women candidates available or even that bona fide recruitment efforts have resulted in a proportionately lower number of qualified female applicants than men. *Cf. EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 185 n.8 (4th Cir. 1979) ("Requiring the defendant to show the inappropriateness of general population statistics in such situations follows the principle of allocation of proof to the party with the most ready access to the relevant information."). We find it significant here, however, that the defendants themselves did not argue to the trial court that failure to control for language invalidated the occupational comparisons.[8]

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[8] The dissent would affirm on this issue because of "plaintiffs' failure to adjust their definition of the relevant labor market to account for" the requirement of foreign language skills. Diss. Op. at 1015 [74a]. We believe the dissent's analysis to be flawed. First, neither party raised such an objection to the relevant labor pool data at trial; it was raised by the district

court in its findings. And then the only reference in those findings to language skills is the one example of a "Cambodian language news analyst/writer/broadcaster." *Medina I* at 9, J.A. at 75-76.

Second, the dissent would appear to require Title VII plaintiffs in an agency like the ICA to introduce, as part of their *prima facie* case, applicant flow data to demonstrate the distribution of language skills in the pool of those otherwise qualified. Diss. Op. at 1016 n.3 [76a]. We cannot agree. *Cf. Dothard v. Rawlinson*, 433 U.S. 321, 330, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977) ("There is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants."). Applicant-flow data may be "relevant," *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13, 97 S.Ct. 2736, 2742 n.13, 53 L.Ed.2d 768 (1977), but "has to be carefully assessed in light of the particular situation in issue." *Patterson v. American Tobacco Co.*, 634 F.2d 744, 753 (4th Cir. 1980) (en banc), *rev'd on other grounds*, — U.S. ——, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982). Actual discrimination or the appearance of discrimination may discourage qualified women from applying; also, "[d]iscriminatory recruiting practices may skew the . . . composition of the applicant pool." *Castaneda v. Pickard*, 648 F.2d 989, 1003 (5th Cir. 1981) (citing B. Schlei & P. Grossman, Employment Discrimination Law 445 (1976)). *Cf. Dothard v. Rawlinson*, 433 U.S. at 330, 97 S.Ct. at 2727 ("The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory."). Thus, plaintiffs cannot be required to rely on data that, if their contentions even appear to be true, may be biased against them. But, even in the absence of reliable data, the dissent would punish "plaintiffs' failure to produce evidence on the matter," Diss. Op. at 1016 n.3 [76a], by refusing to make the logical inference that as many women as men speak any given language either as their mother tongue or as a second language. The dissent hypothesizes that factors not a matter of record, "such as the relative rate of immigration," *id.*, might

affect the distribution of certain language skills. Of course evidence not in the record may also show women more likely than men to be fluent in a second language. *See, e.g.*, Department of Commerce, Statistical Abstract of the United States 1970, at 131 (14,201 women earned bachelors degrees in foreign languages and literature compared with 5,321 men; 2,794 women, 2,071 men earned master's; 204 women, 503 men earned doctorates). The real point, however, is that the Census data on which plaintiffs relied did not correlate language with occupational skills, and, for want of this correlation, plaintiffs should not be thrown out of court.

Finally, and most importantly, we cannot accept the dissent's acceptance of the district court's perception of the *prima facie* case: "[t]he district court seemed to require proof to a mathematical certainty, but there is no such requirement." *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 687 (6th Cir. 1979), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981). Although "[d]eficiencies in the data base 'may, of course, detract from the value of such evidence,' . . . [they] ordinarily would not obliterate its evidentiary value." *Id.* (quoting *Teamsters*, 431 U.S. at 340 n.20, 97 S.Ct. at 1856 n.20). Even so, the *Teamsters* caveat, echoed in *Hazelwood*, that labor pool statistics should reflect the qualified population should be understood in the context of a case in which *general population* figures were submitted. Courts have since questioned whether "*general* population and work force data [are] appropriate as the basis for statistical comparison" where special qualifications exist, *Patterson v. American Tobacco Co.*, 634 F.2d at 753-54 (emphasis supplied), but "*Hazelwood* did not entirely rule out (their) use [even] in 'special qualification' cases." *Id.* at 754 n.15. Here, the base data were not general work force data, but *occupation*-specific data. The dissent would require *job*-specific data, but the source of this requirement is unclear. Neither this court nor the Supreme Court has ever required Title VII class action plaintiffs to present nonexistent data on the population qualified for each *position*, as opposed to particular occupational categories. As we have observed, if such a requirement had been imposed, the statistics

We therefore cannot accept the district court's total rejection, as too imprecise, of both experts' comparisons of Agency occupational categories with Census occupational categories. Were trial courts to apply *Hazelwood* and *Teamsters* as the court did here, statistical evidence would rarely be acceptable in Title VII class actions because statistical evidence is virtually always lacking in the degree of precision demanded by the district court. "[I]n most cases, conditions are far from ideal, with incomplete qualification data and non-random samples being the rule rather than the exception," D. Baldus & W. Cole, *supra*, at 26-27. And yet the Supreme Court's "cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." *Teamsters*, 431 U.S. at 339, 97 S.Ct. at 1856 (quoting *Mayor of Philadelphia v. Education Equality League*, 415 U.S. 605, 620, 94 S.Ct. 1323, 1333, 39 L.Ed.2d 630 (1974)).

Thus relevant labor pool statistics are commonly used although it is rarely possible to be exact in the definition of the relevant labor pool. Sometimes imprecision works to the detriment of plaintiffs as well as defendants. For example, a comparison labor pool based on Census employment statistics does not include *all* those qualified. "[C]ensus statistics analyzing the population by job skill include[ ] in each skill category only people actually employed in those skill categories. People qualified for, but not employed in, such positions [are] omitted from the

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used in *Hazelwood* would have been inadequate for purposes of estimating the qualified population.

statistics quantifying the proportion of the population eligible for the type of employment in question." *Rivera v. City of Wichita Falls*, 665 F.2d at 544 n.19. Certain defects in statistical evidence may, of course, be fatal to a plaintiff's case, as in *Valentino* where comparisons were grossly imprecise or in a case, hypothesized in *Valentino*, where the sample size is inordinately small. *Valentino v. USPS*, 674 F.2d at 66 n.12 (citing *Wilkins v. University of Houston*, 654 F.2d 388, 409 n.37 (5th Cir. 1981)) ("[T]he breakdown of highly specialized workplaces into occupational categories for the purpose of examining the treatment of similarly qualified employees may yield numbers too small to conduct certain types of statistical analyses relied upon to show discrimination in workplaces less specialized.") But because "statistical measures are necessarily imperfect in differing ways and varying degrees," the courts generally "accept what figures are available; allow for imperfections, skewing factors, and margins of error; and then take the figures for what they are worth. Sometimes this is much, sometimes little." *Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, 637 F.2d 1014, 1025 (5th Cir. 1981), *cert. denied*, — U.S. ——, 102 S.Ct. 2233, 72 L.Ed.2d 845 (1982).

In the usual case, statistics are not intended to "conclusively prove intentional discrimination. . . . In recognition of [the] limits on the potential of statistics as a basis for an inference, the courts have given statistical proofs a question-raising, burden-shifting function." D. Baldus & W. Cole, *supra*, at 26-27. We find the base data here to be sufficiently precise and consistent with statistical and legal norms to *permit* an inference of discrimination if

statistically significant disparities exist. We therefore remand for reconsideration of whether plaintiffs made a *prima facie* showing of Agency discrimination in hiring.

B. *Required Findings*

Plaintiffs also protest on appeal that, with respect to the class claims of promotion discrimination and retaliation,[9] the district court's opinion was deficient under Fed.R.Civ.P. 52(a) which requires that a court sitting without a jury "find the facts specially and state separately its conclusions of law thereon."[10] It is established that the requirement of fact findings cannot be met by a "statement of ultimate fact without the subordinate factual foundations for it which must be the subject of specific findings." *O'Neill v. United States*, 411 F.2d 139, 146 (3d Cir. 1969).

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[9] Plaintiffs' retaliation claim was brought under 42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[10] Appellants argue that Rule 52(a) also required the court to make findings of fact upon denial of their motion for a preliminary injunction. We regard this issue to be moot.

Further, the fact findings must touch all material issues. "For this court to exercise adequately its power of review, the district court must make specific findings about the nature and truth of [plaintiffs'] allegations." *Borrell v. ICA*, 682 F.2d 981 at 992 (D.C.Cir.1982). Because the district court's opinion is bereft of reference to the retaliation claim, we must remand for findings on this issue. We are satisfied, however, with the court's findings on the promotion discrimination claim.

To support an inference of discriminatory promotion practices, the plaintiffs introduced undisputed government statistics showing the small percentage of women in higher level Agency positions. *E.g.*, the Agency's FY-1978 Affirmative Action Plan, Sec. C, Table 3 (Plaintiffs' Exhibit No. 22(b)); U. S. Civil Service Commission, Report on Review of Per sonnel Management in the United States Information Agency (Plaintiffs' Exhibit No. 23). The plaintiffs' proposed findings of fact with respect to the promotion claim were based on this statistical evidence and they object on appeal that the district court's opinion failed to include any reference to the data or the inferences to be drawn therefrom. We, too, find it troubling that, while the district court devoted five pages of fact findings to the statistical evidence related to the hiring discrimination claims, the court ignored the statistical evidence presented on the promotion claims. The court, however, acknowledged the allegation of promotion discrimination, stating the issue before it as "[w]hether the defendant's hiring, promotion and salary practices constitute patterns or practices of discrimination. . . ." *Medina I* at 3, J.A. at 70. And, although the court did not

specifically discuss the statistical evidence on promotion practices, it made findings based on defendant's testimonial evidence, concluding:

> In addition to [defendant's witnesses] very credible testimony, the fact that these women have attained the positions they now occupy, and have done so by rapid and consistent advancement, is dispositive of the absence of any pattern or practice of discrimination based on sex at the Agency at all relevant periods in this litigation.

Medina I at 11, J.A. at 78. The "ultimate fact," that there existed no pattern or practice of discrimination, was thus supported by the specific finding of instances of accelerated promotion of women and the credible testimony of women defense witnesses regarding the absence of discrimination in "the advancement of women in any manner." *Id.* at 11. While this court would have been aided by an explicit statement of the district court's reasons for rejecting the inference plaintiffs urged be drawn from the statistics, the district court provided findings "sufficient for a clear understanding of the basis of the decision." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2577 at 697 (1971).

In contrast, the district court's opinion failed to acknowledge the class retaliation claim. The court's recitation of the procedural history does not refer to the supplemental complaint alleging retaliatory practices nor do the "Findings of Fact" or "Conclusions of Law" address the claim. Because a retaliation claim does not depend on whether the challenged employment practices are determined to be unlawful, *see Parker v. Baltimore & O. R. Co.*, 652

F.2d 1012, 1018-19 (D.C.Cir.1981), the court is required to address the retaliation issue independently.

III. The Individual Claims

The individual discrimination claims of Luba Medina and Rose Kobylinski were the subject of a separate trial and a second opinion in which the court dismissed Medina's claim on the merits and denied jurisdiction over Kobylinski's claim because she had not filed a charge with the Equal Employment Opportunity Commission (EEOC), and thus had failed to exhaust her administrative remedies as required by 42 U.S.C. § 2000e-16. Since the trial, however, the Supreme Court has decided that the requirement of timely filing is akin to a statute of limitations and is not a jurisdictional prerequisite, *Zipes v. Trans World Airlines*, — U.S. ——, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), and this court has held that "the critical factor in determining whether an individual Title VII plaintiff must file an EEOC charge, or whether he may escape this requirement by joining with another plaintiff who has filed such a charge, is the similarity of the two plaintiffs' complaints." *Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C.Cir.1981). We reverse the district court's dismissal of Kobylinski's claim because we find that her claim was so similar to that made by Martinez, who had filed an EEOC charge and with whom Kobylinski intervened as a named plaintiff, "that it can fairly be said that no conciliatory purpose would be served by filing separate EEOC charges." *Id.* We affirm, however, the court's dismissal of Medina's claim as based on fact findings that are not "clearly erroneous."

A. *Exhaustion of Administrative Remedies*

In *Foster v. Gueory*, this court reversed the district court's denial of a motion to intervene in a pending employment discrimination suit. The motion had been denied on the ground that the parties who sought intervention had failed to exhaust their administrative remedies, but this court concluded that the purposes of the exhaustion requirement had been served by the initial plaintiffs' filing. The "principal functions of the EEOC filing requirement" are to enable "the EEOC to provide the alleged wrongdoer with notice and to permit possible conciliation." *Id.* at 1323. The *Foster* court concluded that separate filing is required of co-plaintiffs if there exists "a real possibility that one of the claims might be administratively settled while the other can be resolved only by the courts." *Id.* at 1322. But the court held that where two plaintiffs allege that they were similarly situated and received the same discriminatory treatment, the purposes of the exhaustion requirement are adequately served if one plaintiff has filed an EEOC complaint.[11] Here, the claims of Martinez and Koby-

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[11] The court relied in part on a line of cases that establish that only one member of a class need file an EEOC charge.

> The rationale of this line of cases was explained by Judge Griffin Bell:
>
> > It would be wasteful, if not vain, for numerous employees, all with the *same grievance*, to have to process many *identical* complaints with EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume that the next one would be successful. (Emphasis added.)

linski are virtually identical. Each claimed intentional sex discrimination (as opposed to disparate impact). Each was a GS-11 Agency employee who based her claim on defendant's failure to promote her (as opposed to a failure to hire). Each also charged that they performed like services for less pay than men of similar qualifications and experience. Thus, we find sufficient similarity between these claims to doubt the likelihood that conciliation would prove successful as to one where it had failed as to the other.

As the district court found in its order granting the motion to intervene, *Hartman v. Reinhardt*, No. 77-2019 (D.D.C. Sept. 18, 1978), J.A. at 23, plaintiff Martinez had exhausted administrative remedies with regard to her claims. *See* Notice of Final Decision of Agency (Aug. 30, 1978) (from EEO officer to Martinez). We therefore hold that Kobylinski was not

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Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968). In class actions this rationale is invariably applicable, for the very fact that the suit is a class action means that the plaintiffs' claims not only share common questions of law and fact, but those claims are such that representative plaintiffs will fairly and adequately protect the interests of all plaintiffs of the class. Fed.R.Civ.Pro. 23(a)(3) & (4).

Foster v. Gueory, 655 F.2d 1319, 1322 (D.C.Cir.1981).

We do not rely on that line of cases here because recent Supreme Court precedent suggests that the class certified here may have been overbroad, *General Telephone Co. v. Falcon*, — U.S. ——, 102 S.Ct. 2364, 73 L.Ed.2d 740 (1982) (employee claiming promotion discrimination was not properly representative of interests of applicants claiming hiring discrimination), and thus we do not presume from the mere fact of Kobylinski's class membership that there existed shared questions of law and fact.

required to file an EEOC charge, and remand her case to the district court for a decision on the merits.

B. *Medina's Claim*

Appellant Medina protests that the dismissal of her individual claims was based on the district court's misinterpretation of the standard of *prima facie* proof enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). However, in dismissing Medina's claim, the court ultimately relied on the adequacy of defendant's rebuttal evidence. As the court's findings are not "clearly erroneous," we affirm the court's disposition of Medina's claim.

Medina claims that the Agency discriminated against her both on the basis of sex and in retaliation for her previous EEOC complaints and her husband's representation of minorities in EEOC actions. At trial she presented evidence regarding three separate instances of alleged discrimination: (1) the denial of the opportunity to retest for a newsroom position following an unsatisfactory test performance several months earlier; (2) the Agency's rejection of her application for a radio production position; and (3) the Agency's rejection of her application for a position as a foreign language broadcaster.

The district court found that Medina was entitled to retake the test and ordered the Agency to allow a retest, but the court further found that the Agency's denial of Medina's right to retest was a mistake rather than discrimination. As to the Agency's rejection of both job applications at issue, the court found that Medina's proof failed to satisfy the last of the four prerequisites to a *prima facie* showing

enumerated in *McDonnell Douglas*. The court understood *McDonnell Douglas* to require that a discrimination plaintiff show:

> (1) he or she is a minority group member;
>
> (2) he or she applied for a job with the defendant and was qualified for the position;
>
> (3) he or she was rejected despite his or her qualification; and
>
> (4) after the rejection, the job remained open, and the defendant sought other applications.

Medina II at 8, J.A. at 125. To the extent that the court treated these factors as delineating the only circumstances that might give rise to an inference of unlawful discrimination, the court erred. In fact, *McDonnell Douglas* defines but one "model" of such circumstances. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 & n.6, 101 S.Ct. 1089, 1093 & n.6, 67 L.Ed.2d 207 (1981). But the district court's error is not dispositive because the court further stated that even if a *prima facie* case had been made out, the Agency had articulated legitimate nondiscriminatory reasons for its actions and that defendant's proof showed these reasons were not pretextual. This conclusion rested on the court's finding that "other qualified individuals were selected in lieu of Ms. Medina." *Medina II* at 10-11, J.A. at 127-28.

In reviewing the court's findings that the challenged personnel actions resulted from mistake in one instance and reflected legitimate employment decisions in the others, we are bound to give "due regard . . . to the opportunity of the trial court to judge the

credibility of the witnesses," and we may not set aside these findings unless they are "clearly erroneous." Fed.R.Civ.P. 52(a). While, again, we would have been aided on review by discussion of the specific evidence upon which the court relied, we find, in the record, evidence that supports the court's findings. In assessing the qualifications of the man selected in lieu of Medina as Radio Production Specialist, the court relied on the application he submitted to the Agency which described a long career as a "News Director/ Announcer." Defendant's Exhibit No. 38, J.A. at 409. The court based its findings as to the qualifications of persons selected as foreign language broadcasters upon the testimony of the Chief of the Ukranian Service of the Voice of America, who specifically identified her reasons for selecting the other candidates over Medina. Tr. at 200-01 (Dec. 16, 1980) (testimony of O. Dragan). We find no reason to abandon the presumption that the trial court correctly assessed the evidence and the witnesses' credibility.

Finally, the court did not explain its conclusion that Medina was denied a retest by mistake rather than due to discrimination. We note, however, that the testimony about the incident recounts only that Medina was told there would be "no point" to a retest, Tr. at 102 (Dec. 15, 1980) (testimony of L. Medina), and that her initial performance had received "fairly severe ratings," EEOC Report of Investigation, Attachment F-1 (Affidavit of Bernard Kamenske (Nov. 29, 1976)), Defendant's Exhibit No. 39 (Pt. II). The district court could infer from this evidence that, while Medina ought to have been allowed to retest, which the court ordered, she was discouraged from doing so because of the extreme unlikelihood of her

improving her performance sufficiently to meet the Agency's standards rather than because of discriminatory intent. Accordingly, we affirm the court's dismissal of Medina's claims of discrimination.

In view of the foregoing, the case is remanded to the district court for proceedings not inconsistent with this opinion.

So Ordered.

CELEBREZZE, Senior Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's disposition of the class promotion and retaliation claims. The majority properly remanded these class claims for more comprehensive findings of fact. The majority also properly concludes that the district court has jurisdiction to hear Ms. Kobylinski's claim. I believe, however, that the district court properly found that the plaintiffs had failed to establish a prima facie case of discrimination because the plaintiff's statistical evidence does not support an inference of discrimination. Therefore, I cannot agree with the majority's conclusion that the district court improperly discounted the statistical evidence when determining whether a prima facie case had been established.

The majority concludes that the plaintiffs' statistical proof[1] is sufficient to support an inference of

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[1] The plaintiffs' statistical proof indicated that substantial disparities existed in four job categories: electronic technicians, radio broadcast technicians, writers/editors, and foreign information specialists. The plaintiffs' expert concluded that these

discrimination and, thus, that the district court erred in assigning little weight to the evidence. It reasons that the relevant labor market, as defined by the plaintiffs, adequately reflects the qualifications necessary for employment by the Agency.[2] Although it concedes that many Agency positions require skill in a foreign language the majority concludes that the plaintiffs' failure to adjust their definition of the relevant labor market to account for this factor does not create a serious flaw in the statistical comparisons. In support of this conclusion, the majority asserts that we may logically assume that foreign language skills are equally distributed between men and women and that statistical data regarding foreign language skill may not be available. Finally, the majority indicates that the defendant should carry the burden of rebutting the plaintiffs' statistical evidence by showing that female applicants are not so likely as male applicants to possess the requisite language skills.

I believe that the district court correctly concluded that the plaintiffs failed to establish a prima facie case. The question of whether the plaintiffs have established a prima facie case depends upon the weight assigned the statistical proof presented by the

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disparities were statistically significant, with less than .05 probability that the disparities resulted from chance.

[2] The experts of both parties compared the Agency job categories with the most similar job categories used by the Census Bureau in compiling its statistics. Upon completing the "cross-mapping," the expert then compared, in each job category, the percentage of the external labor force which is female with the percentage of the Agency's labor force which is female.

parties. The plaintiff, in order to establish a prima facie case, must produce sufficient evidence to raise an inference of discrimination on the part of the defendant. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977); *Valentino v. United States Postal Service*, 674 F.2d 56, 67 (D.C.Cir.1982). When the plaintiffs seeks to raise the inference by means of statistical proof, they have the "burden of comparing appropriate groups in terms of minimum objective qualifications . . ." Id. at 68. *See Id.* at 68 n.17, 71 n.24; *Wilkins v. University of Houston*, 654 F.2d 388, 408 (5th Cir. 1981). Thus, the plaintiffs must either produce statistical proof which compares the Agency's workforce with that segment of the labor market which possesses the minimum skills necessary for employment by the Agency (including language skills) or demonstrate the validity of their comparisons by showing that foreign language skill is not a minimum qualification for the job categories being compared. The plaintiffs have failed to make either showing; consequently, the statistical evidence is insufficient to raise an inference of discrimination and, thus, is insufficient to establish a prima facie case of discrimination.

The failure of the plaintiffs to include foreign language skill as a factor in defining the relevant labor market seriously flaws the statistical comparison made by the plaintiffs. Generally, the relevant labor market is the group of workers from which the employer hires its employees. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971). When properly defined, the relevant labor mar-

ket should contain only persons with the minimum qualifications necessary for the pertinent positions. *See Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13, 97 S.Ct. 2736, 2742 n.13, 53 L.Ed.2d 768 (1977); *Ste. Marie v. Eastern Railway Ass'n*, 650 F.2d 395 (2nd Cir. 1981). If a comparison is made to an improperly defined labor market, the conclusions drawn may be misleading, because the data are likely to distort the population of a particular minority available to fill a particular position. *See Mayor v. Educational Equality League*, 415 U.S. 605, 620-21, 94 S.Ct. 1323, 1333, 39 L.Ed.2d 630 (1974); *Davis v. Califano*, 613 F.2d 957, 964 (D.C.Cir.1979); *Wilkins v. University of Houston*, 654 F.2d 388, 398 n.13 (5th Cir. 1981). This circuit has concluded, therefore, that the relevant labor market includes only those persons who possess the minimum objective qualifications necessary for a person to be eligible for a particular position. *Davis v. Califano*, 613 F.2d at 964.

In light of these principles, the labor market used by the plaintiffs for purposes of comparison is overly broad because the foreign language skills were not considered in defining the market.[3] For example, the

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[3] The plaintiffs' statistics cannot be used to raise an inference of discrimination, as the majority urges, by means of an assumption that foreign language skills are evenly distributed among men and women. Such an assumption cannot be properly made by this court. First, the assumption is based on the premise that language skills are randomly distributed among the population. The distribution may not be random, however, because, as the majority notes, at note 8 *supra*, many factors not contained in the record may affect the distribution of language skills, such as the relative rate of immigration. Moreover, the majority's assumption unfairly excuses the plaintiffs' failure to produce evidence on the matter. Here, for

evidence indicated that a substantial disparity exists between the number of women employed by the Agency as writers and the number of available female writers. The relevant market, however, is narrower than the plaintiffs grouping. The district court found that many writers for the Agency must be fluent in a second language. The parties agree that this qualification is necessary, *see* Appellants' Brief, p. 50; a writer for the Agency must prepare materials for dissemination in other countries. The plaintiffs' statistical comparison fails to account for the additional foreign language qualifications; therefore, the data are too general to establish the existence or cause of any disparity. Because of this imprecision, the district court properly refused to infer discriminations from the plaintiffs' statistical comparisons.

The plaintiffs failed to establish that their evidence was entitled to more weight, by showing that foreign language skill was not a "minimum objective qualification." *Davis v. Califano*, 613 F.2d at 964. Similarly, the plaintiffs produced no evidence indicating that language skills are evenly distributed among men and women.[4] In short, the plaintiffs have failed to

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example, the plaintiffs might have produced evidence regarding the distribution of language skills among the male and female applicants for positions with the Agency. This applicant flow data would have been sufficient to indicate the distribution of language skills. The plaintiffs bear the burden of producing such evidence, *Valentino v. United States Postal Service*, 674 F.2d at 68 n.17, 67 n.24 and this court should not relieve them from meeting this obligation by assuming the condition.

[4] The plaintiffs have not produced any evidence indicating which jobs require foreign language skills. Thus, we do not know which positions require foreign language skills. The

produce evidence which would support an inference of discrimination. Because the plaintiffs have failed to produce sufficient evidence, the district court's conclusion that the plaintiffs did not establish a prima facie case should be affirmed.

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consequences of this failure must be borne by the plaintiffs, because they bear the burden of raising an inference of discrimination, *Valentino*, 674 F.2d at 68 n.17, and because they bear the burden of demonstrating the relevance of their statistical evidence. *See Ste. Marie v. Eastern Railway Ass'n.*, 650 F.2d 395, 401 n.6 (2nd Cir. 1981). *See generally Valentino*, 674 F.2d at 71 n.24.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 77-2019

CAROLEE BRADY HARTMAN, ET AL., PLAINTIFFS

v.

CHARLES Z. WICK, DEFENDANT

[Filed: Nov. 16, 1984]

CHARLES R. RICHEY, District Judge.

INTRODUCTION

This case is before the Court on remand by the Court of Appeals. Although the Court of Appeals affirmed this Court's decision as to the individual discrimination claim of Luba De Medina and a class claim of discrimination in the promotion of women, it remanded the case as to (1) a class claim of discrimination in hiring, (2) a class claim of retaliation for participation in protected activities, and (3) the individual claim of Rose Kobylinski. For the background of this protracted litigation, *see De Medina v. Reinhardt*, 686 F.2d 997, 1000-01 (D.C. Cir. 1982). With the express agreement of the parties, the Court has considered these claims on the existing trial record, post-remand briefs, supplemental memoranda, and oral argument. After careful consideration, the

Court has decided that it must deny the class claim of retaliation, but it will grant relief on the class claim of discrimination in hiring, and on the individual claim of Rose Kobylinski. This Opinion shall constitute the Court's findings of fact and conclusions of law on these claims.

THE COURT FINDS THAT ROSE KOBYLINSKI WAS DISCRIMINATED AGAINST ON THE BASIS OF HER SEX

Following trial, this Court denied jurisdiction over Rose Kobylinski's claim on the ground that she had failed to file a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") and had thus failed to exhaust her administrative remedies as required by 42 U.S.C. § 2000e-16. The Circuit Court reversed this Court's dismissal, noting that since the trial, "the Supreme Court has decided that the requirement of timely filing is akin to a statute of limitations and is not a jurisdictional prerequisite. . . ." *De Medina v. Reinhardt*, 686 F.2d at 1012 (citing *Zipes v. Trans World Airlines*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982)). The Circuit Court found the Kobylinski complaint so similar to the complaint filed by Josefina Martinez, an intevenor with Ms. Kobylinski, "'that it can fairly be said that no conciliatory purpose would be served by filing separate EEOC charges.'" *Id.* (quoting *Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981)). Thus, the Court will reach the merits of Ms. Kobylinski's claim.

Ms. Rose Kobylinski, a female naturalized citizen of the United States born in Poland, began working in 1964 as a foreign language broadcaster in the Polish Service of the Voice of America, a component of the

United States Information Agency ("Agency"). In June, 1977, the Agency posted a vacancy announcement for a GS-12 writer-editor (radio) position in the Polish Service. At that time Ms. Kobylinski was a GS-11. She held a Bachelor of Arts degree and was experienced in radio broadcasting, as well as writing and journalism. The job description in the vacancy announcement stated that the job included writing weekly features on American Space and other scientific achievements. At that time, there was one Polish Service employee, a male, who occasionally wrote features on American space and other scientific achievements. Ms. Kobylinski complained to the personnel office that the Agency had preselected the male candidate, whom she named, to fill the GS-12 vacancy. Subsequently, the vacancy announcement was withdrawn, and the reposted announcement made no reference to writing features on American space and other scientific achievements. Nevertheless, the male who Ms. Kobylinski had asserted had been preselected for the position was selected to fill it. Ms. Kobylinski did not apply for it because, as she informed officials of the Agency, she felt it would be futile in light of the Agency's preselection.

Ms. Kobylinski's claim is one of disparate treatment. She alleges that the Agency violated Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16, by discriminating against her on the basis of sex with regard to job promotions. The gravamen of her complaint is that the Agency preselected a male candidate to fill the vacant position. If proven, such preselection, in the form of "tailoring" job qualifications to those of a particular candidate, violates Title VII. *E.g. Coble v. Hot Springs School District No. 6*, 682

F.2d 721, 728 (8th Cir. 1982); *Mallard v. Claytor*, 471 F.Supp. 16, 22 (D.D.C. 1978).

MS. KOBYLINSKI HAS ESTABLISHED A PRIMA FACIE CASE

In order to prevail on a disparate treatment claim, the plaintiff first "has the burden of proving by a preponderance of the evidence a prima facie case of discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981). A plaintiff establishes a prima facie case by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which an employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). Of course, "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required . . . is not necessarily applicable in every respect in differing factual situations." *Id.* at 802, n. 13, 93 S.Ct. at 1824, n. 13.

Here the record is clear that Ms. Kobylinski did not apply for the job which she alleges was discriminatorily tailored for male candidates. The Supreme Court has held that a non-applicant may prevail in a disparate treatment case if she meets "the not always easy burden of proving that [she] would have applied for the job had it not been for those [discriminatory] practices." *International Brotherhood of Teamsters*

v. United States, 431 U.S. 324, 367-68, 97 S.Ct. 1843, 1870-71, 52 L.Ed.2d 396 (1977). In Ms. Kobylinski's case, the Court finds that the Agency had, in fact, preselected a male candidate to fill the GS-12 writer-editor (radio) position in the Polish Service. Ms. Kobylinski's application, therefore, would have been an exercise in futility, despite her qualifications. For this reason, and because the allegedly "targeted" male actually filled the vacant position, Ms. Kobylinski has established her *prima facie* case.

THE AGENCY CANNOT REBUT MS. KOBYLINSKI'S PRIMA FACIE CASE

Once the plaintiff establishes a *prima facie* case, the defendant may rebut by producing evidence that someone was preferred over the plaintiff for a legitimate, nondiscriminatory reason. *Texas Dept. of Community Affairs*, 450 U.S. at 254, 101 S.Ct. at 1094. The defendant need only raise a genuine issue of fact as to whether it discriminated against the plaintiff. *Id.* at 254-55, 101 S.Ct. at 1094-95. Here the Agency asserts three arguments in rebuttal. All three arguments must fail.

The Agency claims that because Ms. Kobylinski had not applied for the GS-12 position, it had no way to ascertain her interest in the position. This assertion is flatly contradicted by the evidence. It was Ms. Kobylinski who complained to the Agency's personnel office about the "tailored" nature of the vacancy announcement. In light of her complaint and her qualifications, the Agency will not be heard to claim that it did not know about Ms. Kobylinski's interest in the job.

The Agency also asserts that the "tailored" notice was inadvertent. Once Ms. Kobylinski alerted the Agency to the error, the Agency removed the announcement, and then posted one without the "tailored" qualifications. The response to this assertion is two-fold. First, it is the *preselection* that is discriminatory, not the written content of the vacancy notice. Although the Agency claims that the qualifications for the position did not include writing features on American space and scientific achievements, even after the posting of the neutral vacancy announcement, the originally targeted male candidate was selected to fill the vacancy. Furthermore, the claim of inadvertence is doubtful. This was not the only "preselected" vacancy announcement—it happened on at least two other occasions. In October, 1979, a vacancy occurred in the Polish Service for a GS-12 writer position. The posted vacancy announcement required experience in writing scripts on economics and other specialized topics. At that time there was only one Polish Service employee with this type of background, and he received the job. Another Polish Service vacancy occurred in 1980, and the announcement required experience in teaching English lessons on international radio. Only one employee, a male, had such experience, and he was selected to fill the position. Because of these other instances of preselection, the Court finds that the Agency's preselection in this case was not inadvertent.

The Agency also contends that the rejection of Ms. Kobylinski was not discriminatory because the position was filled pursuant to its standard personnel procedures. The applications were initially screened

by the personnel office, which referred a list of "best qualified" applications to the selecting official. The selecting official then made the final choice, choosing the male candidate from the "best qualified" group. The Agency contends that this procedure protects against preselection. Again, the flaw in the Agency's reasoning is obvious. The personnel office knew about Ms. Kobylinski's interest in the position, but she was never considered because she did not file an application. As stated above, such an application would have been futile. The whole procedure, therefore, was not neutral, as the Agency suggests, but tainted by the preselection. Moreover, a 1976 Civil Service Commission review of the Agency's personnel actions found that the "promotion actions for competitive service have not met the standards of the Federal Merit Promotion Policy." In particular, the Commission concluded that, in some cases, there was evidence "which support[s] that there was preselection and favoritism exhibited in competitive actions." Clearly the Agency cannot rebut the plaintiff's *prima facie* case by following its standard procedures.

EVEN ASSUMING THAT THE AGENCY REBUTTED MS. KOBYLINSKI'S PRIMAFACIE CASE, THE AGENCY'S STATED REASONS ARE PRETEXTUAL

Even if the defendant successfully rebuts the plaintiff's *prima facie* case, the plaintiff may still show that the defendant's stated reasons for the plaintiff's rejection are mere pretext. *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825. The pretext is clear in the present record. As noted above, the Agency preselected male candidates on at least three occasions. The Civil Service Commission also

concluded that the Agency's promotion procedures had not met the appropriate standards. Therefore, even assuming that the Agency successfully rebutted Ms. Kobylinski's *prima facie* case, Ms. Kobylinski must prevail because the Agency's justifications are a mere pretext for discrimination.

THE COURT FINDS THAT THE AGENCY DID NOT RETALIATE AGAINST THE CLASS

By Order of April 19, 1978, this Court conditionally certified this case as a class action. The conditionally certified class consisted of "all women who have applied for employment with or are currently employed by the United States Information Agency and who have been or continue to be adversely affected by the discriminatory employment practices of the defendant."[1] At that time, the only discriminatory practices at issue concerned "promotion and hiring practices." Original Complaint ¶ 1. However, by Order of October 10, 1978, the Court granted plaintiffs leave to file an amended supplemental complaint. That complaint, as amended, included a claim that the Agency "maintained a practice of reprisals against women who have filed sex discrimination charges against the Agency." Supplemental Complaint ¶ 2. Thus, the action contains a class claim against the Agency based on its allegedly discriminatory retaliation. Although this Court denied the class claims, including the retaliation claim, by its October 24, 1979, Findings of Fact and Conclusions of Law, it did not make any findings regarding the class retaliation claim. In remanding the case, the Court of Appeals directed

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[1] The Court, by Order of October 24, 1979, amended the class to exclude women employees in clerical positions.

this Court to make findings of fact and conclusions of law concerning this claim. The Court now considers that claim.

The class retaliation claim is brought under Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). That section provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. § 2000e-3(a).

This section protects those plaintiffs who filed EEO charges against the defendant, or who otherwise "participated" in such a proceeding. It is also clear that the "opposition" clause of this section protects those plaintiffs whose opposition to the defendant's practice fell short of actually filing EEO charges. *Parker v. Baltimore and Ohio Railroad*, 652 F.2d 1012, 1019 (D.C. Cir. 1981). However, because of the language of the Supplemental Complaint, which limited the retaliation claim to "women who have filed sex discrimination charges", the defendant seeks to preclude the Court from considering reprisals against women who did not file charges against the Agency. The Court rejects this contention because, ever since April, 1979, when the plaintiffs sought to enjoin the Agency from retaliating against individuals who opposed the Agency's actions or who "otherwise exercise[d] their rights under Title VII", the Agency has had sufficient notice that the plaintiffs'

class claim extended to women who opposed, in any way, the Agency's discrimination. "Fair notice", such as this, is all that is required. *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). The Court also notes that throughout the period for discovery and the trial in this case, the defendant has not objected to any evidence on the basis that it was beyond the scope of the complaint. Thus, the class retaliation claim is not limited to plaintiffs who filed EEO charges; it encompasses all plaintiffs who have opposed the Agency's discriminatory practices.

BECAUSE THE PLAINTIFFS HAVE FAILED TO PROVE A PATTERN OR PRACTICE OF REPRISALS, THEY HAVE NOT ESTABLISHED A PRIMA FACIE CASE OF CLASS-WIDE RETALIATION

The analytical framework for a retaliation claim derives from that announced in *McDonnell Douglas*, *supra*. To establish a prima facie case, an individual plaintiff must show that (1) she engaged in a protected opposition to unlawful discrimination, (2) her employer subsequently took an adverse employment action, and (3) there was a causal connection between the protected activity and the adverse action. *Burrus v. United Telephone Company of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982); *Hickman v. Flood & Peterson Insurance*, 29 Fair Empl. Prac. Cases 1467, 1469 (D.C. Colo. 1982). The present case involves a class claim of retaliation, however, not an individual one.

Claims based upon retaliation are "generally personal in nature." *Pendleton v. Crown, Cork & Seal Co.*, 31 Fair Empl.Prac.Cases 1701, 1705 (D. Md. 1980). *See also Colbert v. City of Wichita*, 33 Fair Empl.

Prac.Cases 218, 220 (D. Kan. 1983) (retaliation usually takes many forms, and thus it is not well-suited for class treatment). Thus, there are very few cases involving class claims of retaliation such as this one. Because retaliation manifests itself in many ways, and often turns on facts peculiar to each case, the Court holds that, to establish a *prima facie* case, the retaliation must have been pursuant to a general practice of the defendant. *Cf. General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 159 n. 15, 102 S.Ct. 2364, 2371 n. 15, 72 L.Ed.2d 740 (1982) (rejecting class certification for "across-the-board" attacks against various discriminatory practices, but leaving open the possibility that a single general practice of discrimination could justify a class, because "it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination.") (emphasis in original).[2] Therefore, in the analytical framework mentioned above, step (2) must be modified in class actions to reflect the requirement that the adverse actions must have been

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[2] The Court realizes that *Falcon* did not rule on the merits of the claim, but denied class certification. The Court also recognizes that, under Rule 23(c), Fed. R. Civ.P., it could even now deny certification. *Cf. Larionoff v. United States*, 533 F.2d 1167, 1183 (D.C. Cir. 1976), *aff'd* 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977); *Jimenez v. Weinberger*, 523 F.2d 689, 697 (7th Cir. 1975), *cert. denied sub nom., Mathews v. Jimenez*, 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d 1204 (1976) (both cases ruling on class certification when also deciding the case on the merits). However, it has been over five years since this case was first filed, and the Court considers it best to finally reach the merits of this retaliation claim. This also seems to be what the Court of Appeals had in mind when it remanded this claim for findings of fact and conclusions of law. 686 F.2d at 1011.

taken pursuant to a general practice or policy of the defendant.

In presenting this class retaliation claim against the Agency, the plaintiffs chiefly rely upon deposition testimony, and related exhibits, of six female Agency employees. Plaintiffs' Post-Remand Brief on Class Retaliation Claims at 1. As explained below, this evidence is insufficient to establish a general practice of reprisals taken by the Agency, and thus the plaintiffs have failed to present a *prima facie* case of retaliation.

Ms. Barbara Callihan testified for the plaintiffs. She was employed in the Current Affairs Division of the Voice of America as a researcher/writer. She complained to her supervisor, Mr. Hanu, that she felt that she was being asked to do secretarial-type duties. After she complained in writing about typing duties, Mr. Hanu wrote her a note stating, "As I told you before, no one refuses *any type* work in this division. If you are still unclear about your duties in this division, please consult your job description which, I am sure, contains the clause 'plus any other type work assigned,' etc. And if you are still unsatisfied, I will have to accept your resignation." (Callihan Exhibit # 1).

However, Ms. Callihan also testified that Mr. Hanu's temper was not aimed solely at women. She stated, "if you are asking me if he is picking on women, I couldn't tell you. I don't think he does." (Callihan Deposition, 108). She further stated, in response to a question about whether his disagreements with employees was limited to women, "[m]an or woman, black or white, it doesn't make a bit of difference if he is upset with you, but look out." *Id.*

Finally, Ms. Callihan testified that she knew of no one who was threatened with reprisals for their participation in the suit. *Id.* at 115.

Ms. Michala de Souza was a foreign language broadcaster in the Czechoslovakian Service who felt that she was assigned secretarial duties. She once complained to her supervisors, who responded that, because she was an alien, she should not complaint[*sic*]. (de Souza Deposition, 26-27, 58). Although she was frightened, *id.* at 34, after speaking with an Agency personnel officer, the situation was resolved to her satisfaction. *Id.* at 61. In fact, by the time of her deposition, she had recently been promoted. *Id.* at 59.

The plaintiffs also rely upon the deposition testimony of Anita K. Tong, who was employed in the Chinese Service as a producer. She complained to a union representative that she was required to perform greater services for less pay than males in the same job. (Tong Deposition, 43-44). She testified that she was severely criticized by her supervisors afterwards. *Id.* at 45-46. And, after her deposition, one of these supervisors signed an unfavorable performance evaluation for Ms. Tong. (Tr. 5/31/79, 46-48).

Ms. Deborah Showalter also testified. Although she was a college graduate, she applied and was hired as a clerk/typist. (Showalter Deposition, 6). She received some professional duties as a writer even though she remained a clerk/typist. *Id.* at 25. She felt as though she deserved a promotion, and she went over her supervisors' heads to speak to the Deputy Administrator concerning a promotion. *Id.* at 26-27. This upset her supervisors, one of whom was Mr. Hanu. Ms. Showalter sought the help of a union

representative to obtain a promotion. *Id.* at 46-60. Mr. Hanu had apparently called her a troublemaker, and at a staff meeting, he inaccurately stated that she had filed a class action against him. *Id.* at 71, 73-75. After realizing that his information was incorrect, Mr. Hanu publicly retracted the statement and personally apologized to Ms. Showalter. *Id.* at 83. As previously noted, some plaintiffs testified about Mr. Hanu's temper, and that his disagreements are not limited to women. (Callihan Deposition at 108).

Ms. Etel Berger, a GS-9 foreign language broadcaster in the Brazilian Branch of Voice of America, testified as to Agency reprisals. She felt that she was performing the same duties as others at GS-11 or GS-12 levels. (Berger Exhibit # 8). She felt as though she would not receive a promotion, so she wrote a letter to the Director of Personnel announcing her intention to leave. (Berger Exhibit # 9). Her supervisors then called her in for a meeting to discuss her problems. (Berger Deposition, 100). One of her supervisors, Ms. Lucille DePalma, did not like the way her voice sounded on the air, and suggested that she take some lessons on how to improve it. *Id.* at 102. Ms. DePalma also stated that Ms. Berger did not have enough experience to handle a particular show ("Informe") because she had not worked on weekends, where the broadcast format is less structured and less supervised. *Id.* Ms. Berger said that she "welcome[d] the opportunity to" try the weekend work, and she was thereafter assigned such work. *Id.* at 102, 107. After she performed a particular Saturday show, the senior producer in the Brazilian Department applauded and congratulated her. *Id.* at 107-08. Also, after learning of Ms. Berger's expressed inten-

tion to leave the Agency, the assistant to the Director of Voice of America had personally called her to express her appreciation for her work and to assure her that she would get a grade raise. *Id.* at 148.

Ms. Rose Kobylinski, the remaining individual plaintiff, testified that some women expressed fear for her because she was participating in the suit. (Tr. 5/30/79, 158). The plaintiffs have not demonstrated the grounds for this expressed fear. Nor is there any evidence that Ms. Kobylinski suffered reprisals for her participation in this case.

The plaintiff's evidence does not establish the requisite policy or practice of discrimination. The plaintiffs chiefly rely upon the testimony of only six witnesses. Some (but probably not all) of these witnesses may have been able to substantiate individual claims of retaliation. However, there is no evidence of a general policy of retaliation in the Agency. The plaintiffs have presented no evidence linking these incidents. The alleged reprisals took various forms and came from various officials. In short, there is insufficient evidence to overturn this Court's October 24, 1979, Finding of Fact that there is an "absence of any pattern or practice of discrimination based on sex at the Agency at all relevant periods in this litigation." *Medina v. Reinhardt*, Nos. 77-0360, 77-2019, and 78-0762, slip op. at 11 (D.D.C. Oct. 24, 1979) (hereafter "slip op."). Therefore, the plaintiffs have failed to establish a *prima facie* case of class-wide discrimination in the form of retaliation.

THE COURT FINDS THAT THE AGENCY DISCRIMINATED AGAINST WOMEN IN HIRING

During the trial of this case the Court heard considerable testimony from statistical experts. Each side presented an expert who subdivided the Agency's workforce into occupational categories and sought to translate ("cross-map") each Agency category into a Census category. Thus, the experts agreed on the basic methodology involved in defining the relevant labor market. However, in some instances, they disagreed as to which specific Census categories they would compare to the Agency's occupational categories. In its October 24, 1979 Findings of Fact and Conclusions of Law, this Court held that the cross-mapping presented by both sides was insufficient to gain meaningful insight into whether the Agency's hiring practices were discriminatory:

> The Court finds that both plaintiffs' and defendant's experts have failed to produce sufficiently precise labor-pool-availability figures whether nationally or locally. Due to the inherent unreliability of broad and general cross-mapping with a specialized variety of highly-skilled positions at the Agency as compared to the available Census and BLS [Bureau of Labor Statistics] job categories, the "cross-mapping" done here is of little or no value in the case at bar.

The Court concluded that the plaintiff class had failed to establish a *prima facie* case of discrimination under 42 U.S.C. § 2000e *et seq.*

The Court of Appeals reversed and remanded this part of the Court's decision. After reviewing the Supreme Court's holdings in *International Brotherhood*

of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), and *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), the Court stated that this Court required too much precision in the use of statistics:

> The standard of precision the district court demanded, far from being mandated by these cases, is unprecedented and unjustifiable, insofar as it results in a total rejection of the Census data as a basis for statistical comparisons to establish a *prima facie* case.

686 F.2d at 1005.

Noting that the Census has fewer occupational categories than the Civil Service system, the Court of Appeals stated:

> We are satisfied that comparing Agency occupational categories to the broader Census categories is appropriate because all types of jobs the Census includes within any given Census occupational categories are sub-specialties of that occupation; thus, such aggregations retain "generally similar job skills" in common. *Valentino v. USPS*, 674 F.2d [56] at 68.

686 F.2d at 1006. Thus, the Court will turn to the merits of the class-wide hiring claim, considering the parties' statistics.

In light of the Court of Appeals' decision, this Court must reconsider its previous determination that there was insufficient evidence of a pattern or practice of discrimination at the Agency. (slip op. at 11). As the following analysis demonstrates, after careful scrutiny, the Court has also reconsidered its earlier determination that the conclusions of

Dr. Wolfbein, the defendant's expert, are entitled to more weight than those of Dr. Rosenblum, the plaintiff's expert. *Id.* at 7. Upon reconsideration, the Court finds that, in six major occupational categories, which constitute approximately fifty percent of the Agency's work force, the Agency has discriminated against women.

BECAUSE OF GROSS STATISTICAL DISPARITIES, THE PLAINTIFFS HAVE ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION IN HIRING

In *Hazelwood School District v. United States*, the Supreme Court stated:

> Where gross statistical disparities can be shown, they alone may in proper case constitute prima facie proof of a pattern or practice of discrimination.

433 U.S. at 307-08, 97 S.Ct. at 2741-42. Thus, plaintiffs may establish a *prima facie* case by demonstrating that statistically significant disparities exist between the proportion of female Agency employees by job category and their availability in the relevant labor market.

The plaintiff's expert, Dr. Rosenblum, performed a relevant labor market analysis of the Agency's work force to assess its utilization of women in comparison with the availability of women in the relevant labor market. Dr. Rosenblum obtained a list of the fourteen major occupational titles at the Agency. These occupational categories represented over 75% of the Agency's workforce. Of those fourteen categories, Dr. Rosenblum eliminated four which were primarily clerical in function. Women who had sought employment with the Agency in these occupations are no

longer class members since this Court modified the class to exclude women who applied for or were in clerical positions. (Order of October 24, 1979). Dr. Rosenblum then cross-mapped the Agency occupations with occupational categories used by the Bureau of Census.

After completing the cross-mapping, Dr. Rosenblum compared the proportion of women employed by the Agency in each of these ten categories with the proportion of women available in what he considered to be the most appropriate Census category, i.e., the relevant labor market. Dr. Rosenblum examined the Agency's workforce as December 31, 1978. He determined that the disparities were not substantial in four of the ten major job categories. These four categories constituted about thirteen percent of the Agency's total employment.

In six major categories, Dr. Rosenblum found statistically significant disparities between the Agency's utilization of women and the availability of women in the appropriate Census category. These six categories were Electronic Technician, Foreign Language Broadcaster, Production Specialist, Writer/Editor, Foreign Information Specialist, and Radio Broadcast Technician. These six categories constitute about 50% of the Agency's total employment. The following table summarizes Dr. Rosenblum's standard deviation analysis concerning the utilization of women in these six categories:

UTILIZATION OF FEMALE WORKERS BY THE AGENCY

Job Title	Employed	Expected	Difference	Significance
Electronic Technician	1	10	9	2.97 S.D.
Foreign Language Broadcaster	60	114	54	10.23 S.D.
Production Specialist	28	43	15	2.82 S.D.
Writer, Editor	94	155	61	6.45 S.D.
Foreign Information Specialist	172	388	216	13.56 S.D.
Radio Broadcast Technician	5	64	59	14.77 S.D.

As Dr. Rosenblum testified, customary scientific practice recognizes that where the number of standard deviations of the difference exceeds 1.65, the disparity is unlikely to have occurred by chance.[3] (Tr. 5/29/79, 124-125). The underutilization of women was significant in each of these six categories, where the standard deviations ranged from 2.82 to 14.77, in each case well beyond the threshold for statistical significance.

The defendant at this point attacks plaintiffs' statistics in two major respects. The defendant questioned Dr. Rosenblum's focus only on the larger

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[3] In addition to the scientific community, the Supreme Court has also approved the use of standard deviation analysis. *See Hazelwood*, 433 U.S. at 311, n. 17, 97 S.Ct. at 2743 *Castaneda v. Partida*, 430 U.S. 482, 496-97, n. 17, 97 S.Ct. 1272, 1281, n. 17, 51 L.Ed.2d 498 (1977).

Agency job categories rather than on each of the Agency's occupations. The defendant also disputes the validity of Dr. Rosenblum's cross-mapping to the Census categories in some occupations. As shown below, neither of these attacks defeats plaintiffs' *prima facie* case.

The defendant asserts that Dr. Rosenblum's analysis is flawed because it focuses on only about fifty percent of the Agency's total employment. First, it must be noted that the class action no longer concerns those Agency employees in clerical positions, so Dr. Rosenblum properly excluded those employees from his analysis. (Slip op. of October 24, 1979, p. 7). Dr. Rosenblum also focused only on the major occupational categories at the Agency, those contained in the Agency's affirmative action plan. (Tr. 5/29/79, 146). Dr. Rosenblum was then left with ten major categories to analyze, which comprised sixty-three percent of the Agency's total work force. *Id.* at 101. Of these ten categories, Dr. Rosenblum found significant underutilization of women in the six explained above. These six categories constituted slightly over fifty percent of the Agency's work force. *Id.* at 147.

To the extent that the defendant quarrels with Dr. Rosenblum's exclusion from analysis of numerically small categories, the defendant's argument misses the mark. Ever since *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 611, 94 S.Ct. 1323, 1328, 39 L.Ed.2d 630 (1974), it has been clear that unreliable statistics based on small sample sizes are discouraged. *See also Valentino v. United States Postal Service*, 674 F.2d 56, 72 (D.C.Cir.1982) (numbers may be too small to properly conduct a statistical

analysis, but "small numbers are not *per se* useless, especially if the disparity shown is egregious.")

Moreover, a glance at some of the smaller occupational categories serves to confirm, rather than weaken, plaintiffs' *prima facie* case. Indeed, the disparities seem to reach the "egregious" level mentioned in *Valentino, supra.* The following table, based on Defendant's Exhibit # 6, sets forth twenty-one white collar occupational categories in which the Agency employed no females as of December 31, 1978:

OCCUPATIONAL CATEGORY	TOTAL	MALES	FEMALES
Guard	12	12	0
History	1	1	0
Labor Relations	2	2	0
Office Service Management	1	1	0
Financial Management	1	1	0
General Engineer	2	2	0
Engineer Technician	11	11	0
Civil Engineer	4	4	0
Mechanical Engineer	11	11	0
Electronic Engineer	16	16	0
Photography	14	14	0
Tech. Writer & Editor	1	1	0
Gen. Facilities & Equipment	2	2	0
Facility Management	4	4	0
Printing Management	15	15	0
Equipment Specialist	6	6	0
Training & Instruction	1	1	0
General Supply	2	2	0
Supply Progress Management	2	2	0
Distribution Facilities	2	2	0
Traffic Management	5	5	0
	115	115	0

The same exhibit, (Def. #6), also demonstrates that the Agency employed no women in eighteen of the Agency's twenty-three blue collar categories, where a total of sixty-two men were employed. However, because each of these categories contained sixteen men or fewer, these categories were insufficient in size to determine whether statistically significant disparities existed. Thus, Dr. Rosenblum was justified in eliminating them from his relevant labor market analysis.

In summary, Dr. Rosenblum did not perform a relevant labor market analysis in every Agency job category. Small categories, which could not support a meaningful statistical analysis, were not analyzed. Even in many of those categories, however, it appears that women were underutilized. Although Dr. Rosenblum properly refused to draw conclusions from these categories, *Mayor of Philadelphia*, 415 U.S. at 611, 94 S.Ct. at 1328, the Agency can find little comfort in his failure to analyze them.

The Agency also challenges Dr. Rosenblum's cross-mapping in some of the six particular categories where Dr. Rosenblum found significant underutilization by women. Initially, it is noted that the plaintiffs and defendants agreed on which Census category to use for the Agency category of Electronic Technician. In two other Agency categories, the defendant's choice for the proper Census category still leads to statistically significant disparities.[4]

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[4] Indeed, for the Agency category of Foreign Information Specialist, the plaintiffs chose the Census category of Writers and Artists while the defendant compared it to the Census category of Editors and Reporters. Had Dr. Rosenblum used the defendant's category for comparison, because the availability of

Concerning the cross-mapping of the other categories, Dr. Rosenblum reviewed the job descriptions contained within the Civil Service Commission's Qualifications Handbook, as well as additional material published by the Agency, to compare them to "the most compatible Census occupation[s]." (Tr. 5/29/79, 65-66). While the experts agreed as to this methodology, they disagreed as to the categories in some instances. The Court, however, finds that this is an area where reasonable experts could disagree. In short, at this *prima facie* case stage, the defendant's attack on Dr. Rosenblum's particular instances of cross-mapping would have the Court impose the "inappropriately high standard of precision" that has been rejected by the Court of Appeals. 686 F.2d at 1007.

Thus, because of the persuasive statistical disparities presented, the plaintiffs have established a *prima facie* case of sex discrimination in hiring for the six major occupational categories. *See Hazelwood*, 433 U.S. at 307-08, 97 S.Ct. at 2741-42 ("where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.")

THE DEFENDANT'S STATISTICS ARE INSUFFICIENT TO REBUT THE PLAINTIFFS' PRIMA FACIE CASE

Once the plaintiffs have established through statistical evidence a pattern or practice of sex discrimination, the burden shifts to the employer to show that

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women there exceeded that in the Writers and Artists category, the size of the disparity would have *increased*. (Tr. 5/29/79, 161-162).

the plaintiffs' "proof is either inaccurate or insignificant." *Teamsters*, 431 U.S. at 360, 97 S.Ct. at 1867. Here the Agency attempts to rebut the plaintiffs' *prima facie* case through the labor market analysis of its own expert, Dr. Seymour Wolfbein.

Dr. Wolfbein cross-mapped Agency categories to what he considered to be the most appropriate Census category, as did Dr. Rosenblum. Although the experts agreed as to methodology, their approaches differed in certain respects. The defendant, through Dr. Wolfbein, sets forth four main attacks on Dr. Rosenblum's analysis. Dr. Wolfbein initially asserts that Dr. Rosenblum's analysis was flawed because he only focused on approximately fifty percent of the Agency work force. Second, Dr. Wolfbein contends that Dr. Rosenblum's analysis only provided a "snapshot" of the Agency's work force, and did not consider the Agency's hiring statistics over a period of time. Third, Dr. Wolfbein disagrees with Dr. Rosenblum's judgment of which Census categories were appropriate in five of the six major categories where Dr. Rosenblum found significant underutilization of women. Fourth, Dr. Wolfbein asserts that Dr. Rosenblum should not have relied upon the 1978 Current Population Survey for employment data. However, none of these arguments rebuts the *prima facie* case established by the plaintiffs.

As previously explained, *supra* pp. 20-23, Dr. Rosenblum did not simply examine only one half of the Agency's work force. He started with the numerically large categories, covering about seventy-five percent of the work force, then he properly eliminated those in clerical positions. After cross-mapping the remaining ten categories, he found statistically

significant underutilization of women in six of those categories. It is these six categories which comprise about fifty percent of the Agency's total employment.

In contrast to Dr. Rosenblum's careful focus only on numerically large categories, Dr. Wolfbein performed a relevant market analysis for virtually all of the Agency's positions, without regard to the size of the categories. Because he failed to take into account the small numerical size of many categories, however, Dr. Wolfbein's analysis produced some extremely distorted results. For example, using Dr. Wolfbein's cross-mappings and calculations for 1978 figures, Dr. Wolfbein concluded that in the Agency's professional occupations, the proportion of women employed by the Agency exceeded their availability in eight of these occupations, while the proportion of women was below their availability in the remaining eight occupations. Thus, Dr. Wolfbein asserts that this presents a balanced employment of women by the Agency.

Upon closer examination of the actual number of employees involved, however, the distortion of these figures becomes apparent. For example, in some of the categories where Dr. Wolfbein found the Agency to have employed women in proportions exceeding the market availability, the Agency employed the following numbers of employees:

OCCUPATIONAL CATEGORY	TOTAL	MALES	FEMALES
Lawyer	10	8	2
Public Relations	12	6	6
Writer (Translator)	4	1	3
Research Workers n.e.c.[5]	20	10	10

The size of these categories stands in stark contrast to two of the professional occupations where Dr. Wolfbein found a proportionately low number of women employees:

OCCUPATIONAL CATEGORY	TOTAL	MALES	FEMALES
Editors & Reporters	1,506	1,224	282
Technician	276	270	6

These numbers alone clearly demonstrate that Dr. Wolfbein's attack on Dr. Rosenblum's focus on large categories cannot be sustained. It is apparent that Dr. Rosenblum properly rejected categories with few employees. *See Mayor of Philadelphia*, 415 U.S. at 611, 94 S.Ct. at 1328.

Dr. Wolfbein's hiring analysis suffers from the same problem as his utilization analysis: Dr. Wolfbein did not take into account the disproportionate results that numerically small categories would produce. In four of the nine professional job categories where Dr. Wolfbein found that the agency hired, from 1973 to 1978, more women proportionately than were available in the relevant labor market, the actual numbers are insignificant:

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[5] The abbreviation "n.e.c." stands for "not elsewhere classified."

FULL TIME HIRES BY OCCUPATION, 1973-1978

OCCUPATIONAL CATEGORY	TOTAL	MALES	FEMALES
Lawyer	12	11	1
Public Relations	4	1	3
Writer (Translator)	3	2	1
Research Workers, n.e.c.	7	3	4

In contrast to these small numbers are two of the seven professional categories where Dr. Wolfbein found a disproportionately low number of women hires:

FULL TIME HIRES BY OCCUPATION, 1973-1978

OCCUPATIONAL CATEGORY	TOTAL	MALES	FEMALES
Editors & Reporters	436	299	137
Technician	103	103	0

In light of these disproportionate results, Dr. Wolfbein's hiring figures obviously cannot rebut plaintiffs' *prima facie* case. Dr. Wolfbein simply has failed to show that Dr. Rosenblum's focus on the statistically large categories is "inaccurate or insignificant." *See Teamsters*, 431 U.S. at 360, 97 S.Ct. at 1867.

Dr. Wolfbein also attacks Dr. Rosenblum's use of the 1978 Current Population Survey data. Dr. Wolfbein himself used data from the 1970 Decennial Census. Although the Current Population Survey used a smaller sample than did the Census, Dr. Wolfbein has failed to show that the figures are unreliable. Moreover, the 1978 figures are, of course, more recent than the 1970 figures. Thus, the Court finds that the

choice of the more recent 1978 Current Population Survey statistics was a reasonable one.

Dr. Wolfbein's final rebuttal argument attacks Dr. Rosenblum's cross-mapping in four of the six relevant categories. When each category is individually analyzed, however, one can see that Dr. Rosenblum carefully selected an appropriate Census category for the cross-mapping.

For the Agency category of Radio Broadcast Technician, Dr. Rosenblum chose the Census Radio Operator category. Dr. Wolfbein disagreed, choosing the Census Electronic Technician category. However, even using the cross-mapping chosen by Dr. Wolfbein, both experts agreed that the Agency underutilized women in the Radio Broadcast Technician category to a statistically significant degree. (Tr. 5/29/79, 160-61; Tr. 6/1/79, 99).

Dr. Rosenblum cross-mapped the Agency category of Foreign Information Specialist with the Census category of Writers and Artists not elsewhere classified. Dr. Wolfbein compared it to the Census category of Editors and Reporters. However, the availability of women in the Editors and Reporters category exceeded the availability of women in the category of Writers and Artists not elsewhere classified. Thus, had Dr. Rosenblum accepted Dr. Wolfbein's cross-mapping in this category, the disparity found by Dr. Rosenblum would have increased.

Dr. Rosenblum compared the number of women employed as Foreign Language Broadcasters with the availability of women in the Census category of Editors and Reporters. Dr. Wolfbein chose the Census category of Radio Announcers. However, the record

demonstrates that Dr. Rosenblum's choice was well-reasoned. He considered the duties required in that Agency position, and concluded that the Census Editors and Reporters category was the most appropriate "because of the emphasis on the writing and the preparation of the material." (Tr. 5/29/79, 99). This conclusion is supported by the testimonial evidence of Agency employees in the Foreign Language Broadcaster category. Ms. Michala de Souza testified that her Broadcaster job involved duties such as "working on the programming, translating, writing, narrating, editing, ..." (de Souza Deposition, 22). Because of the consideration of the duties of a Foreign Language Broadcaster, Dr. Rosenblum's choice of Editors and Reporters was an appropriate one. Dr. Wolfbein has failed to show that his choice was more appropriate.

Dr. Rosenblum cross-mapped Audio Visual Production Specialists with Writers and Artists, while Dr. Wolfbein compared them to the Census managerial category. Ms. Luba Medina testified that, as a producer, she was required to select and edit musical inserts, produce live radio shows, coach announcers, and control the timing of shows. (Tr. 12/15/80, 41-49). She also testified that the nonprofessional duties were simply "incidental", and "not the essence of [her] job." *Id.* at 44. This uncontradicted testimony demonstrates that the skills required of an Agency Audio Visual Specialist were those of a professional artist rather than a manager. Thus, Dr. Rosenblum properly chose the Writers and Artists category for this cross-mapping.

In sum, the defendant's rebuttal attack on Dr. Rosenblum's statistical analysis fails on all fronts. Dr. Rosenblum considered all statistically meaning-

ful categories at the Agency, and found significant disparities in six major categories. Although he analyzed the Agency's work force at a specific point in time, the defendant's hiring statistics are clearly insufficient to rebut the plaintiffs' *prima facie* case. Dr. Rosenblum's use of the 1978 Current Population Survey figures was justified because those statistics were much more current than the 1970 Census figures used by Dr. Wolfbein. Finally, Dr. Rosenblum carefully and appropriately cross-mapped each Agency category he considered. Therefore, the plaintiffs have presented and unrebutted *prima facie* case of sex discrimination at the Agency. This discrimination was particularly meaningful in six major Agency occupations. The Court finds that the plaintiffs are entitled to judgment in these six categories, which constitute approximately fifty percent of the Agency's employment. *See United States v. County of Fairfax*, 25 Fair Empl.Prac.Cases 662, 666 (E.D. Va.1981) (where the court found liability in particular occupational categories).

CONCLUSION

The Court today has found that the Agency discriminated against the individual plaintiff, Rose Kobylinski, with respect to a promotion opportunity. The Court has also found significant discrimination against women as a class with regard to hiring in non-clerical Agency positions. This discrimination is meaningful in six major occupational categories, and the Court's holding is limited to those categories. Finally, the Court has decided that the Agency did not maintain a pattern or practice of discrimination in the form of retaliation. In view of the fact that this case was bifurcated into liability and relief stages, the

Court will next proceed to the question of relief. The Court has today issued an Order consistent with this Opinion, which Order shall direct the parties to attend a status call to address the question of further proceedings.

ORDER

For the reasons set forth in the Court's Opinion of even date herewith, it is, by the Court, this 16th day of November, 1984,

ORDERED: That judgment as to liability be, and the same hereby is, entered against the defendant for the individual discrimination claim of Ms. Rose Kobylinski; and it is

FURTHER ORDERED: That judgment as to liability be, and the same hereby is, entered against the plaintiffs for the class claim of retaliation; and it is

FURTHER ORDERED: That judgment as to liability be, and the same hereby is, entered against the defendant for the class claim of discrimination in hiring; and it is

FURTHER ORDERED: that this case shall be set down for a status conference, to be held on the 3rd day of January, 1985, at 10:00 A.M. in Courtroom 11, at which time the Court will consider further proceedings in this case.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 77-2019

CAROLEE BRADY HARTMAN, ET AL., PLAINTIFFS,

v.

CHARLES Z. WICK, DEFENDANT

[Filed: Jan. 19, 1988
As Amended Jan. 29 and Feb. 16, 1988]

INTRODUCTION

CHARLES R. RICHEY, District Judge.

By Order of April 19, 1978, the Court conditionally certified this case as a class action. That class consisted of "all women who have applied for employment with or are currently employed by the United States Information Agency and who have been or continue to be adversely affected by the discriminatory employment practices of the defendant."[1] On November 16, 1984, this Court found that defendant had "discriminated against women as a class with regard to hiring" in six occupational categories at the defendant agency. *Hartman v. Wick*, 600 F.Supp. 361, 375 (D.D.C.1984). That Opinion details the background of this long-lived litigation, as does *De Medina v. Rein-*

[1] On October 24, 1979, the Court excluded female applicants for clerical positions from the plaintiff class.

hardt, 686 F.2d 997, 1000-01 (D.C.Cir.1982), an appeal of an earlier decision in this case.

The Court's 1984 Opinion and Order dealt solely with the question of liability. From January 12, 1987, through January 14, 1987, the Court held a trial to determine appropriate remedies. At trial, and in their post-trial submissions, the parties clarified the areas of agreement and disagreement about the proper scope and contour of remedies in this case. The Court has carefully considered the testimony, the exhibits, the pre-trial and post-trial briefs of both parties, and the underlying law. On the basis of the record and the law, the Court has made the following determinations.[2]

I. THE NEW LAW SET FORTH BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN PALMER V. SHULTZ MAY NOT BE APPLIED RETROACTIVELY IN THIS CASE.

The Court must first note that the Court of Appeals for this Circuit has recently wrought a significant change in the law governing the use of statistics in a discrimination case. In *Palmer v. Shultz*, 815 F.2d 84 (D.C.Cir.1987), the D.C. Circuit distinguished between "one-tailed" and "two-tailed" statistical analyses.[3] Ending its earlier silence on this

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[2] This Opinion shall constitute the Court's findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a).

[3] In the argot of statisticians, a "one-tailed test" examines whether one group is disfavored in hiring decisions while a "two-tailed test" considers whether the same group both receives preferential treatment and faces any discrimination. *Palmer v. Shultz*, 815 F.2d 84, 94-96 (D.C.Cir.1987) (outlining differences between one-tailed and two-tailed tests).

issue, the Circuit stated that "although we by no means intend entirely to foreclose the use of one-tailed tests, we think that generally two-tailed tests are more appropriate in Title VII cases." *Id.* at 95.

If the *Palmer* decision were applied retroactively to the case at bar, the Court's 1984 finding of liability might be questioned, as it was based on a "one-tailed" statistical test that might no longer be deemed appropriate in this type of suit. *See Hartman v. Wick*, 600 F.Supp. 361, 369, 375 (D.D.C.1984). Consequently, the Court must consider whether *Palmer's* strong suggestion that courts should employ a "two-tailed" analysis should be applied retroactively in this case.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971), the seminal case on retroactive application of new case law, the Supreme Court noted that, although retroactive application is the usual rule, three factors may counsel against retroactivity:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was clearly foreshadowed. . . . Second, [a court] . . . must 'weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' . . . Finally [a court must weigh] the inequity imposed by retroactive application, for "[w]here a decision . . . could produce substantial inequitable results if applied retroactively, there is ample basis in our

> cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-07, 92 S.Ct. at 355 (*quoting Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965) and *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969)).

These factors suggest that retroactive application of *Palmer* would be inappropriate in this case. First, prior case law did not "foreshadow" *Palmer's* near-requirement of a two-tailed test; in fact, the *Palmer* court confessed "some trepidation" in approaching this uncharted issue. *Palmer v. Shultz*, 815 F.2d at 92. Second, failure to use a "two-tailed" test in this case will have no effect whatever on use of the test in subsequent cases. Moreover, equity clearly counsels against retroactive application of *Palmer's* preference for two-tailed tests. When remanding this very case, the Court of Appeals expressed approval for the statistical method that would later underlie the liability finding. *Hartman v. Reinhardt*, 686 F.2d 997, 1009-1010 (D.C.Cir.1982). In light of that decision, and the resources devoted to this suit as a consequence thereof, the Court finds that equity prevents retroactive application of *Palmer v. Shultz* in this suit.

II. THE OCCUPATIONAL CATEGORIES AT ISSUE IN THIS SUIT.

A. *The job categories in which the Court found discrimination have been reclassified.*

In its 1984 decision on liability, the Court found that the United States Information Agency ("USIA" or "the agency") had discriminated against women

applicants for jobs in six major occupational categories: Electronic Technician (Series 856), Foreign Language Broadcaster (Series 1048), Production Specialist (Series 1071), Writer/Editor (Series 1082), Foreign Information Specialist (Series 1085), and Radio Broadcast Technician (Series 3940). *Hartman v. Wick*, 600 F.Supp. at 370. Three categories have been reclassified and now have titles and job series numbers different from those described in the 1984 suit. *See* Defendant's Exhibit No. ("Def.Ex.") 3.[4]

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[4] On his Exhibit 3, defendant notes that three of the six job series have been redesignated as follows:

Former Series	Current Series
Foreign Language Broadcaster (1048)	IRB (Other) (1001)
Writer/Editor (1082)	Writer/Editor (1082) IRB (English) (1001) IRB (Other) (1001)
Foreign Information Specialist (1085)	IRB (English) (1001) IRB (Other) (1001)

Again according to Defendant's Exhibit 3, the following series were not reclassified: Electronic Technician (856); Production Specialist (1071); Radio Broadcast Technican (3940).

Plaintiffs question whether Exhibit 3 fully reflects the actual reclassification of the Foreign Information Specialist Series (1085), as it excludes those positions reclassified into Series Number 130. *Plaintiffs' Post-Trial Reply Brief*, at 4. Defendants admit that Series 130 contains the foreign service officer jobs for which class members applied. *Transcript* at 337 (Testimony of Bliss Cornell Cartwright, Senior Research Analyst, Longbranch Research Associates). As detailed below, because there is no basis on which to exclude all foreign service applicants from the plaintiff class, Series 130 is one of the job series at issue in this remedial order.

As plaintiffs applied for and were unlawfully denied jobs with the abandoned title and series number, they may well not realize the newly categorized job series include the posts they originally sought. Consequently, the Court will order that the notice to potential class members refer to the jobs at issue by both former and current names and numerical categories.

B. ***Foreign Service Officer applicants are included in the plaintiff class unless they actually sought relief under the consent decree in Palmer v. Shultz.***

In its 1984 Opinion and Order, the Court found that female Foreign Service officer applicants were among the women against whom defendant had discriminated in hiring. 600 F.Supp. at 370.[5] Prior to the January, 1987, trial on remedies, defendant moved for partial summary judgment on claims raised by unsuccessful female applicants for the Foreign Service who sought appointment at USIA after December, 1980. At the January 8, 1987, pre-trial, the Court denied that motion, without prejudice to renewal after trial. Defendant has now renewed that motion, which the Court will now deny with prejudice in all but one respect and will grant with respect to one group of foreign service candidates.

Defendant raises several arguments to support his summary judgment motion. First, he maintains that unsuccessful Foreign Service applicants cannot be considered "applicants" for the positions at issue in

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[5] These women had largely applied for what had been categorized Foreign Information Specialist Job Series 1085. *Hartman v. Wick*, 600 F.Supp. at 370.

this suit and therefore cannot be part of the plaintiff-applicant class. *Defendant's Post-Trial Brief* at 3-4. The trial record does not support this assertion.

During the first trial in this case, defendant produced evidence showing that (former) Job Series 1085 largely consisted of Foreign Service officers. *Transcript*, June 1, 1979, at 8-10; 103-03; 117-20; 144-50 (Testimony of Dr. Seymour Wolfbein). Plaintiffs' expert reached the same conclusion. *Id.* at 64-165, *in passim* (Testimony of Dr. Marc Rosenblum). As Job Series 1085, also called the Foreign Information Specialist Series, was one of the series in which defendant is liable for sex discrimination in hiring, *Hartman v. Wick*, 600 F.Supp. at 372, defendant would have to prove that Foreign Service applicants can no longer be considered "applicants" to that job series or any successor designation.

First, Defendant has not produced any evidence suggesting that Job Series 1085 changed during the relevant time period so as to exclude Foreign Service officer applicants. To the contrary, defendant's own expert stated during the 1987 trial that Series 1085, and its successor Series 130, *include* Foreign Service officers. *Transcript*, at 337-38 (Testimony of Bliss Cornell Cartwright, Senior Analyst, Longbranch Research Associates) ("Cartwright Testimony"). As such, this argument does not support exclusion of Foreign Service applicants to USIA from the plaintiff class.

Nor does defendant gain support from his argument that Foreign Service applicants should be excluded from the class because they do not specify that they wish to be placed in the USIA job series. The testimony establishes that Foreign Service applicants are

placed wherever the Board of Examiners believes them best suited. *Transcript*, at 96-110 (Testimony of Frontiss Burbank Wiggins, Jr., Director of Policy and Coordination for Director General, Department of State) ("Wiggins testimony"). Among such Foreign Service slots are those in the successor job series to Job Series 1085. *Id.* Thus, if Foreign Service candidates "apply" anywhere, they apply, *inter alia*, to a Job Series at issue in this suit.

Next, defendant argues that the Department of State is unilaterally responsible for testing potential Foreign Service officers and therefore the defendant United States Information Agency cannot afford relief to aggrieved Foreign Service applicants. This is the same argument that defendant raised in his unsuccessful Motion to Dismiss and his Motion to Reconsider the Court's denial of that motion. The Court continues to believe that its earlier decisions are correct and stands by the reasoning set forth in its December 24, 1986, Order.

Moreover, the testimony at trial undercuts any argument that defendant cannot afford relief to potential Foreign Service Officers. There is no question that the Board of Examiners, which conducts and evaluates foreign service examinations, is not controlled by the State Department but is an interagency board on which USIA officials serve as equal partners. *Transcript*, at 95-96 (Wiggins testimony). Although the agencies participating in the Junior Foreign Service Officer program have jointly tested candidates since December, 1980, one section of the written exam is substantially designed by the USIA and used solely to evaluate candidates' potential for USIA employment. *Id.* at 96-99. Candidates must

pass this section of the test to be considered for a foreign service post within USIA. *Id.* Even though the Board of Examiners may in theory determine the passing score, the Board customarily allows USIA to set the passing score on this portion of the exam in order to assure the necessary number of candidates for USIA employment. *Id.* at 99-100.

The evidence at trial revealed that, at least in some Foreign Service programs, the USIA also exerts control over other stages of the Foreign Service applicant process. Candidates for "Mid-Level" programs do not sit for the written Foreign Service examination but proceed directly to the Oral Assessment of potential Foreign Service officers. *Id.* Plaintiffs showed that USIA controlled the selection of these Mid-Level officials and in fact misused the selection process for political purposes. Plaintiffs' Exhibit Number ("Pl.Ex.") 231 ("RLC: Subj: BEX/Affirmative Action Program"); *Transcript* at 122-24 (Wiggins testimony). Indeed, plaintiff even adduced unrebutted evidence showing that USIA vetoed at least one Mid-Level applicant because there were "enough women in the Foreign Service at mid-level." Pl.Ex. 230 (Memo from Cowan to Albright Re Candidacy of Dr. Shirley Hill-Witt).

In sum, Junior Foreign Service applicants to the United States Information Agency take an examination that is developed in pertinent part by that agency and scored in pertinent part by that agency. The State Department does not control the portion of the Foreign Service selection process that is specifically dedicated to evaluating Foreign Service applicants to the United States Information Agency. And the United States Information Agency can exert substan-

tial control over the so-called "objective" Oral Assessment process and review. Thus, there is no merit to defendant's claim that the Foreign Service examination process is outside the control of the defendant in this case.

Finally, defendant argues that the claims of these applicants have been resolved through the consent decree entered in *Palmer v. Shultz*,[6] Civil Action No. 76-1439, and thus are barred by the doctrines of *res judicata* and collateral estoppel. While this argument is largely unconvincing, the Court will grant defendant's motion for summary judgment as to one particular group of foreign service applicants.

Res judicata and collateral estoppel are affirmative defenses that are waived unless specifically and timely raised. *See, e.g.*, C.A. Wright and A. Miller, *Federal Practice and Procedure*: Civil § 4405. Defendant neither raised these defenses in his answer nor sought leave to amend his answer to include them. As such, defendant may not raise either bar if he is guilty of "undue delay, bad faith, or dilatory motive" and plaintiff would experience "undue prejudice" if the defense were permitted. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). Plaintiffs' burden is inversely proportional to the length of delay: the longer defendant has

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[6] As explained below, *Palmer v. Shultz* was a class lawsuit alleging that the State Department had unlawfully discriminated against women in the Foreign Service. The consent decree settled one portion of the suit. Under the consent decree, the Department of State agreed to implement a series of steps designed to rectify alleged discrimination in hiring women for Junior Foreign Service Officer positions. *See* Pl.Ex. 204 (*Palmer* consent decree).

waited, without explanation, to raise the defense of preclusion, the lesser amount of prejudice must plaintiffs show. *See, e.g., Evans v. Syracuse City School District*, 704 F.2d 44, 47 (2d Cir.1983).

Defendant's unexplained delay in raising his claims of preclusion was extreme. Defendant states that the *Palmer v. Shultz* consent decree that allegedly resolved the claims of unsuccessful foreign service applicants to the USIA was entered on October 12, 1983. Yet defendant never broached the issue of preclusion prior to this Court's November, 1984, finding of liability in the instant case. Nor was the *Palmer* decree mentioned prior to the originally scheduled September, 1986, trial date, or even prior to December 21, 1986, when the rescheduled trial was to have occurred. In fact, it was not until December 23, 1986, more than three years after the decree was entered, after trial of the remedial phase of this action was to have begun, and on the eve of the rescheduled January, 1987, trial, that defendant brought the possibility of preclusion to the Court's attention.

Defendant has offered no explanation for his three-year delay in raising the *res judicata* and collateral estoppel defenses. To allow defendant to inject the possibility of issue or claim preclusion after this long and unexplained delay would inevitably prejudice plaintiffs' case. For nearly three years, plaintiffs have framed their case and formulated their legal strategy on the assumption that the *Palmer* consent decree was not relevant to this case. This prejudice alone is ample ground on which to deny defendant's motion for partial summary judgment. *See Evans v. Syracuse City, School District*, 704 F.2d at 46-47 (sig-

nificant delay in raising affirmative defenses "invariably" causes prejudice).

Although the Court is convinced that plaintiffs would be prejudiced if defendant were permitted to raise the collateral estoppel and *res judicata* defenses, plaintiffs themselves do not elaborate upon the prejudice they have suffered. Accordingly, the Court will not deny defendant's motion on grounds of waiver alone. There is, however, another reason that the Court must deny defendant's motion.

In order to maintain a *res judicata* or collateral estoppel defense, defendant must first offer sufficient evidence that foreign service applicants to USIA were parties or in privity to the parties to *Palmer v. Shultz* and were eligible for relief under the consent decree. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). Defendant has not done so.

First, defendant does not offer argument, citation to case law, or citation to the record to support his claims of preclusion. Rather, he merely notes that the consent decree in *Palmer v. Shultz* was binding on all applicant class members except those who "opted out" of the *Palmer* plaintiff class and implies that the *Palmer* class consisted of *all* women who applied for Junior Foreign Service Officer positions from February 4, 1976, through October 12, 1983. These allegations are not supported by the trial record.

The record demonstrates that the relief afforded by the consent decree was available *only* to Foreign Service applicants who sought appointment *to the State Department. Transcript* at 79-80 (Wiggins tes-

timony) (emphasis added). Indeed, the *Palmer* class notice asked class members to state that they sought employment in one of four "functional fields," all of which related to jobs only in the State Department. *Id.* at 85 (Wiggins testimony). The class notice itself stated that the *Palmer* class consisted only of women who applied for Junior Foreign Service positions *within the State Department. Defendant's Motion for Partial Summary Judgment*, Attachment B. Equally telling, any respondent to the class notice who expressed interest in a job at the USIA was told categorically that she could not be hired under the *Palmer* decree and would have to compete for a USIA spot under a different program. *Transcript* at 87 (Wiggins testimony).

Thus, Foreign Service applicants who sought a post at the United States Information Agency—in other words, the Foreign Service applicants who are unquestionably members of the plaintiff class in this lawsuit—were not eligible for relief under the *Palmer* decree. The Court can only conclude from the unrebutted trial record that Foreign Service applicants to the United States Information Agency were neither parties nor privies to the consent decree in *Palmer v. Shultz* and the defenses of *res judicata* and collateral estoppel therefore may not be invoked.

Although the Court has found that the *Palmer* plaintiffs and the plaintiffs in this case are conceptually separate and identifiable classes, the Court realizes that some Foreign Service applicants who preferred appointment to USIA may nevertheless have sought appointment to the State Department under the procedures set forth in the *Palmer* decree. As post-December, 1980 applicants could not indicate a

preference for USIA appointment when they applied to the Foreign Service, *Transcript* at 88-89 (Wiggins Testimony), the Court must assume that women who sought relief under the *Palmer* decree were primarily interested in State Department positions and therefore ineligible for any remedy in this case.

Indeed, equity commands this finding, else some women might seek recovery under both *Palmer* and this case for what amounts, at base, only to one "act" of discrimination. This result is bolstered by the *Palmer* consent decree, which specifically states that it represents the full settlement of all claims of discrimination against members of the *Palmer* plaintiff class. Pl.Ex. 204; *see also, e.g., Southern Pacific Communications Co. v. American Telephone and Telegraph Co.*, 740 F.2d 1011, 1021 (D.C.Cir.1984). Therefore, the Court will grant defendant's motion for summary judgment *only* with respect to those female Foreign Service applicants who sought relief under the *Palmer* consent decree and must therefore be deemed members of the *Palmer* plaintiff class.

C. *Women who submitted multiple applications and were later hired for one position are eligible for inclusion in the plaintiff class.*

Defendant argues that potential class members who applied for several jobs, were rejected for at least one, and were ultimately hired for one position must be excluded from the plaintiff class. *See Defendant's Post-Trial Brief* at 3. Neither logic nor law supports this position.

At base, defendant's argument suggests that a woman who was unlawfully denied employment on the basis of sex discrimination can recover nothing if she

is hired when she applies for the same or a similar job several years later. While a plaintiff cannot recover relief for any period after she obtains the position sought, her right to a remedy for the years in which she was denied employment cannot be erased by defendant's belated decision to forswear sex discrimination in hiring. *See Ford v. Equal Employment Opportunity Commission*, 458 U.S. 219, 227 n. 9 & 232-34, 102 S.Ct. 3057, 3063 n. 9, 3066, 73 L.Ed.2d 721 (1982). The law demands that any member of the plaintiff class who was ultimately employed by defendant obtain a remedy based on the amount of time in which she experienced discrimination and its effects. The fact that she subsequently achieved her goal cannot erase this basic right.

D. *The plaintiff class includes women who were denied a position that was allegedly filled by another woman.*

Defendant argues that the Court must exclude from the plaintiff class any woman who applied for a position at issue in this suit that was filled by another woman. This is incorrect as a matter of law.

As detailed below, once a particular plaintiff has carried her burden of proof and shown that she is entitled to relief, defendant may produce evidence showing that there was a legitimate, non-discriminatory reason for failing to hire the female applicant. *See* pp. 335-336, *infra*. Defendant may at that time prove that a different woman was hired for the same position, *see, e.g., Harrison v. Lewis*, 559 F.Supp. 943, 946 (D.D.C.1983), and plaintiff may attempt to show that this action was pretextual. *Id.* Thus, while a plaintiff may not be entitled to recover if she was denied a position in favor of another woman, she is

nonetheless eligible for an individualized determination of her claims. *Id.*

E. *The plaintiff class includes non-resident aliens who applied for USIA jobs to be performed in the United States.*

Title VII explicitly excludes aliens employed "outside any State" from its protections. *See* 42 U.S.C. § 2000e-1. Defendant urges the Court to interpret this language as excluding from Title VII's protections non-resident aliens employed within the United States and therefore asks the Court to exclude potential class members who were neither citizens nor residents of the United States when they applied for one of the jobs at issue in this suit.[7] This claim has been rejected by another Court, *see Seville v. Martin Marietta Corp.*, 638 F.Supp. 590, 592 (D.Md.1986), and this Court must reject it as well.

Nothing in Title VII's language, or its legislative history, supports exclusion of aliens employed in the United States from the Act's scope. 42 U.S.C. § 2000e; *see also, e.g.*, H.R.Rep. No. 914, 88th Cong., 2d Sess., *reprinted in*, 1964 U.S.Code Cong. & Ad. News 2355, 2393. And, as courts must give the language of civil rights statutes "broad and inclusive effect," and must extend their coverage to the outer limits permitted from a fair reading of the statute, Sutherland Stat. Const. § 74.05 (4th ed.), there is no basis upon which the Court can exclude non-resident aliens from the Act's stateside scope.

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[7] The Court has not been asked to consider whether the protections of Title VII extend to non-resident aliens applying for positions abroad. *See Plaintiff's Post-Trial Reply Brief*, at 31.

Thus, in light of the plain language of the statute, the silent legislative history, and accepted rules of statutory construction, the Court must find that Title VII applies to non-resident aliens who apply for employment within the United States. Any such potential members of the plaintiff class will be able to seek relief through the mechanism afforded by the Court in this Opinion and the accompanying Order.

III. TO BE A MEMBER OF THE PLAINTIFF CLASS, A WOMAN MUST HAVE APPLIED FOR ONE OF THE POSITIONS AT ISSUE IN THIS SUIT BETWEEN OCTOBER 8, 1974 AND NOVEMBER 16, 1984.

A. *The plaintiff class opens on October 8, 1974.*

A federal class action is "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 550, 94 S.Ct. 756, 764, 38 L.Ed.2d 713 (1974). Consequently, the filing of a class suit tolls the applicable statute of limitations so that potential class members need not file separate actions simply to avoid a statute of limitations bar. *Id.* at 550-51, 94 S.Ct. at 764-65.

In the Title VII context, the law provides that the timely administrative charge of discrimination generally tolls the applicable limitations period for all those who could join in that complaint as a class. *See, e.g., Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235, 1248 (7th Cir.1980); *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 361 (7th Cir.1978), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303 (1979); *Laffey v. Northwest*

Airlines, Inc. (Laffey I), 567 F.2d 429 (D.C.Cir.1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978). More precisely, only those individuals who *could have* filed a discrimination claim at or after the time a named plaintiff first brought an administrative charge are eligible for class membership and do not themselves have to pursue administrative process. *E.g.*, *id.*; *see also, e.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 2370 n. 8, 45 L.Ed.2d 280 (1975); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1333-34 n. 1 (D.C.Cir.1973) (per curiam). Because a federal employee must file a charge of discrimination within thirty days of the allegedly discriminatory act, *see* 29 C.F.R. § 1613.213(a)(1)[8], a class of federal employee plaintiffs "opens" thirty days prior to the date on which a named plaintiff sought an administrative remedy for defendant's sex discrimination in hiring. *See, e.g.*, *Laffey I*, 567 F.2d at 472.[9]

The parties agree that the plaintiff class should open on the date a person who later brings suit files an administrative complaint of discrimination. The parties disagree, however, about the precise date to which the Court must look. Defendant urges the Court to look to the date on which a named plaintiff filed a formal administrative complaint; in contrast,

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[8] During the time period relevant to this action, this regulation was found at 5 C.F.R. § 713.214(a)(1)(i)(1974).

[9] Defendant apparently does not agree that thirty days is the proper reference point; rather, defendant contends that class membership opens 180 days prior to the filing of the relevant administrative complaint. This is an incorrect statement of the law. *See* 29 C.F.R. § 1613.213(a)(1)(1986); 5 C.F.R. § 713.214(a)(1)(i); *see also McKenzie v. Sawyer*, 684 F.2d 62, 72 n. 8 (D.C.Cir.1982); *Laffey v. Northwest Airlines*, 567 F.2d at 472.

plaintiffs would have the Court look to the date on which a named plaintiff first initiated the required *administrative processing* of her charge. Thus, plaintiffs claim, the Court must use the date on which a named plaintiff filed a formal grievance, a prerequisite to the filing of a formal administrative charge. 29 C.F.R. § 1613.214(a)(i) (1987).

Plaintiffs are correct. To determine when the statute of limitations is tolled, a Court must look to the date on which a class representative initiated mandatory administrative processing of a discrimination charge. *See, e.g.*, 29 C.F.R. § 1613.213; *see also*, 5 C.F.R. § 713.214 (1974). Where, as here, counseling is a prerequisite to the filing of an administrative complaint of discrimination, *id.*, the date on which counseling was requested is the date that the class opens. *See, e.g., McDonald v. United Air Lines, Inc.*, 587 F.2d at 361.

There is, however, a more complicated area of disagreement with respect to the opening date of the class. Defendant would have the Court set the opening date with reference to the administrative complaint filed by named plaintiff Carolee Brady Hartman on March 3, 1977. *See* Def.Ex. 85, Part I. Plaintiffs would have the Court look instead to the administrative complaint filed by named plaintiff Toura Kem on November 7, 1974. *Id.* at 93, Part I.

Defendant advances two arguments against the use of Ms. Kem's complaint as the referent for the opening date of the class. First, defendant maintains that, unlike Ms. Hartman's, Ms. Kem's administrative complaint did not explicitly allege discrimination against a class of women and therefore did not provide adequate notice that defendant might face a class suit.

See Defendant's Post-Trial Brief, at 2. In addition, defendant contends that Ms. Kem is not a "named plaintiff" for the purpose of determining the opening date of the plaintiff class because she became a named plaintiff only when the Court ordered Ms. Kem's separate lawsuit consolidated with this one. *See Defendant's Post-Trial Reply Brief*, at 2-3

There is no merit to either of defendant's arguments. The Court will address each in turn.

First, an administrative complaint need not specify that it contains class allegations. *Foster v. Gueory*, 655 F.2d 1319, 1322-23 (D.C.Cir.1981). The law clearly holds that a federal employee puts the agency on notice that it may be subject to a class-wide claim of discrimination when he or she files an administrative charge of discrimination, even if the charge purports to be filed only on the signatory's behalf. *See, e.g., Paskuly v. Marshall Field & Co.*, 646 F.2d 1210, 1211 (7th Cir.1981) (per curiam); *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 361 n. 11 (7th Cir.1978), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303 (1979); *Allen v. Amalgamated Transit Union Local 718*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891, 98 S.Ct. 266, 54 L.Ed.2d 176 (1977).

In fact, federal regulations in effect when Ms. Kem's 1974 complaint was filed did not clearly allow an agency to consider a "class" claim. *Barrett v. United States Civil Service Commission*, 69 F.R.D. 544, 553 (D.D.C.1975). Indeed, when Ms. Hartman filed her "class" complaint, the agency Administrator responded that he was "not authorized to accept class action suits" and summarily dismissed the complaint. Def. Ex. 85, Part II, Tab A. Given both the relevant case law and the history of the treatment afforded to

Ms. Hartman's complaint, the Court cannot find that it is barred from considering Ms. Kem's administrative charge because the charge did not clearly state that it was filed on behalf of a class. *See, e.g., Bachman v. Collier*, 73 F.R.D. 300, 303 (D.D.C.1976) ("class" caption not required if it would have been a "futile act.").

Moreover, defendant is wrong to allege that Ms. Kem's charge provided no notice of the possibility that defendant might face a class suit. By explicitly calling her charge a claim of discrimination "against females" at USIA, Def. Ex. 93, Part III, and not just on her own behalf, Ms. Kem surely informed defendant that a class suit might follow. Indeed, she may actually have come as close to filing a class administrative claim as was then possible. Thus, the contention that Ms. Kem's claim cannot be the administrative predicate for this class lawsuit cannot stand.

Defendant's other argument against the use of Ms. Kem's claim is that Ms. Kem was not originally a named plaintiff in this suit and therefore "the fact that Ms. Kem eventually became a named plaintiff . . . is of little consequence other than to establish her class membership." *Defendant's Post-Trial Reply Brief*, at 2. Defendant argues that "case law and equity" mandate against use of the date of Ms. Kem's claim as the benchmark for opening the class. Quite in contrast to defendants' proposition, law and equity require the use of Ms. Kem's complaint.

If defendant's objection is merely that Ms. Kem was not originally a co-plaintiff in this suit but became a named plaintiff when her case was consolidated with the Hartman case, it must fail. The law clearly

provides that an administrative complaint filed by a litigant not originally a party to the particular suit can be the basis for determining the opening date of a plaintiff class. *See, e.g., McDonald v. United Air Lines*, 587 F.2d at 361 n. 11.

If defendant is maintaining that only a complaint filed by a named plaintiff can provide adequate notice of the eventually resulting lawsuit, it still fails. The purpose of the administrative filing requirement is "to give notice to the charged party and enable the Commission to conciliate" the allegation of discrimination. *Laffey I, Inc.*, 567 F.2d at 472. This purpose is "adequately served by a timely filing by any member of the class." *Id.* Because notice and a chance for conciliation are provided whether or not the administrative complainant becomes an "originally named plaintiff," the opening of a Title VII class "can be controlled by complainants who filed earlier than the date on which the class representative filed." *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 361 n. 11 (7th Cir.1978); *Allen v. Isaac*, 99 F.R.D. 45, 50 (N.D.Ill.1983).

Thus, the law provides that named plaintiff Kem's complaint properly serves as the reference for the opening of the plaintiff class. Equity supports this decision as well. Were a different rule to apply to this case, plaintiff Toura Kem herself could not be a member of the class.

As mentioned above, plaintiff Kem began the grievance procedure in November, 1974, while plaintiff Hartman filed her charge in March, 1977. Ms. Kem filed a lawsuit on April 28, 1977, and moved to consolidate her action with Ms. Hartman's on October 25, 1978. If defendant's interpretation of the law is cor-

rect, and anyone who experienced discrimination more than thirty days before Ms. Hartman filed her administrative complaint is excluded from the plaintiff class, clearly plaintiff Kem could not recover. Equity demands a different result.

Exclusion of Ms. Kem from the plaintiff class on the grounds of a time bar is a concept relatively new to this suit. In fact, in his Opposition to Ms. Kem's motion to consolidate, defendant noted that Ms. Kem "potentially qualified" as a member of the class. *Response to Motion to Consolidate*, at 2. Defendant suggested only that Ms. Kem's claim raised substantive issues different from those raised by Ms. Hartman's case; he never once hinted at the possibility that consolidation of Ms. Kem's claim was inappropriate because hers was temporally distant from the Hartman administrative charge.

On November 22, 1978, the Court consolidated Ms. Kem's claim with the suit filed by Carolee Brady Hartman. Nearly nine years later, it is more than a little late for defendant to raise a statute of limitations question that suggests consolidation was inappropriate for a reason never before brought to the Court's attention. *See, e.g., 5 Federal Practice and Procedure*: Civil § 1278.

In sum, there is no basis in law or equity on which to ignore the administrative claim filed by named plaintiff Toura Kem as the proper basis for determining the opening date of the plaintiff class. Accordingly, the Court finds that the plaintiff class will open on October 8, 1974, thirty days prior to Ms. Kem's invocation of the mandatory grievance procedure.

B. *The plaintiff class closes on November 16, 1984.*

The parties agree that the plaintiff class should close on November 16, 1984, the date of the Court's determination of defendant's liability in this case. *See Plaintiff's Post-Trial Brief* at 8-9; *Defendant's Post-Trial Brief* at 2. The Court agrees that the law, and the evidence adduced at trial, supports closing the class on this date and will therefore order that the plaintiff class closes on November 16, 1984. *See, e.g., Harrison v. Lewis*, 559 F.Supp. at 946.

IV. EXCEPT FOR FOREIGN SERVICE APPLICANTS, CLASS MEMBERS WHO WISH TO PARTICIPATE IN CLASS RELIEF ARE ENTITLED TO INDIVIDUALIZED DETERMINATIONS OF THEIR CLAIMS.

A. *The large majority of class members has not been identified.*

The parties agree, and the evidence adduced at trial demonstrates, that defendant has not maintained a complete list or file of job applicants from which the names of all potential members of the plaintiff class can be culled.[10] *See Transcript* at 218-22 (Testimony of Patricia Howell Hoxie, Chief, Domestic Personnel Division, United States Information Agency) ("Hoxie Testimony"); *id.* at 264-66 (Testimony of Johnnie Otto Manzo, Chief, Operations Division, Voice of America) ("Manzo Testimony"). In fact, the evidence suggests that until the Court's November, 1984, finding of

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[10] The Court notes at this point that the procedure for notifying class members who were Foreign Service applicants will be different from the procedure set forth in Section IV of this Opinion. That procedure is described *infra*, at Section V.

liability against defendant, or even until a few months thereafter, defendant had a policy of destroying employment applications that were more than two years old. *Id.* at 219, 222 (Hoxie Testimony); 264 (Manzo Testimony).[11]

The testimony of defendant's expert Bliss Cartwright, as well as testimony provided by Ms. Hoxie and Ms. Manzo, shows that defendant has maintained partial applicant information for 1983 and nearly complete applicant information for 1984. *Transcript* at 281-82 (Cartwright Testimony); *see also, id.* at 219-220 (Hoxie Testimony); *id.* at 265 (Manzo Testimony). These records will help identify some potential members of the plaintiff class.

But it is evident that these files, which cover at most two of the ten years relevant to this case, do not provide a basis for identifying the large majority of the plaintiff class. In order to identify as many members of the plaintiff class as is reasonably practicable, a broad-based approach to notifying potential class members is necessary. *See* Fed.R.Civ.P. 23(d).; *see also, e.g., Segar v. Smith*, 28 Empl.Prac.Dec. P 32,588

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[11] The Court will not conclude, as plaintiffs ask, that this destruction of records demonstrates bad faith or a deliberate attempt by defendant to prevent identification of class members. First, the agency destroyed these documents in accordance with OPM regulations. *Transcript*, at 264 (Manzo Testimony). Moreover, given the Court's original finding in defendant's favor, the Court cannot fault defendant for discarding records it had reason to think irrelevant to court proceedings. While it appears that some employment applications may have been destroyed after the Court's November, 1984, finding of liability, *see* Pl.Ex. 247 (Memo from Rosacker to Davis, Kincaid, and Twardowski re *Hartman v. Wick*), the evidence is far from conclusive on this point.

(D.D.C.1982). As the Court has already found defendant liable, defendant must bear the full expense of this notification task. *See, e.g.*, H. Newberg, *Newberg on Class Actions* § 8.22 (1985 and Supp. April, 1987); *see also, Mills v. Electric Auto-Lite Company*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Segar v. Smith*, 28 Empl.Prac.Dec. P 32,588.

B. ***Notice will be mailed to identified class members and, because of the large number of unidentified class members, notice by posting, publication, and memoranda will also be ordered. In addition, plaintiffs will be permitted to conduct limited discovery in order to identify additional class members who may have been encouraged to apply for the jobs at issue by word-of-mouth recruitment.***

As defendant has maintained applicant information for some years at issue, *Transcript* at 281-82 (Cartwright Testimony), defendant will be ordered to send notice by certified mail to all female applicants for the relevant job categories who can be identified by a search through defendant's files. *See, e.g., Laffey v. Northwest Airlines*, 572 F.Supp. 354 (D.D.C.1983), *appealed on other grounds*, 746 F.2d 4 (D.C.Cir.1984), *cert. denied*, 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985). As notice by mail is not a practicable method for reaching the vast majority of the plaintiff class, defendant will also have to provide notice through wider-reaching channels.

Defendant agrees that the class notice must be published in the largest newspaper in each of the eighteen largest Standard Metropolitan Statistical Areas

("SMSA"s) in the country.[12] *Defendant's Post-Trial Reply Brief*, at 5-6. The Court agrees that these measures are necessary and proper methods for notifying potential class members. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 167, 94 S.Ct. 2140, 2147, 40 L.Ed.2d 732 (1974); *In re National Student Marketing Litigation v. The Barnes Plaintiffs*, 530 F.2d 1012, 1014 (D.C.Cir.1976) (newspaper publication); *Luevano v. Campbell*, 93 F.R.D. 68, 76 (D.D.C. 1981) (same); *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196 (N.D.Ga.1974) (posting in defendant's offices).

The Court does not agree, however, that the limited publication suggested by defendant is notice reasonably calculated to reach as many members of the plaintiff class as is reasonably practicable. For one, class members may not read the newspaper of largest circulation; although the *New York Daily News* has a larger circulation than the *New York Times*,[13]

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[12] As of June 30, 1986, the eighteen largest SMSAs are as follows: New York-Northern New Jersey-Long Island-Connecticut; Los Angeles-Anaheim-Riverside; Chicago-Gary-Lake County; San Francisco-Oakland-San Jose; Philadelphia-Wilmington-Trenton; Detroit-Ann Arbor; Boston-Lawrence-Salem-Lowell-Brockton; Houston-Galveston-Brazoria; Dallas-Fort Worth; Washington, D.C.; Miami-Fort Lauderdale; Cleveland-Akron-Lorain; Atlanta; St. Louis; Pittsburgh-Beaver Valley; Minneapolis-St. Paul; Baltimore; Seattle-acoma. United States Department of Commerce, Bureau of the Census, *USA Statistics in Brief : A Statistical Abstract Supplement* (1987).

[13] As of September 1, 1987, the weekday circulation of the *New York Times* was 1,056,924 copies per day. The *New York Daily News* weekday circulation was 1,278,118 copies per day. The *Times*, however, does have a slightly higher Sunday circulation, 1,645,060 copies to the *Daily News's* 1,631,688. D.

USIA itself often advertises job openings in the *Times* rather than the *Daily News*. *See* Pl.Ex. 247 (Aug. 30, 1985, Memo to Nierenberg from Rosacker). This suggests that USIA expects its recruits to read the less widely circulated paper.

At trial, plaintiffs introduced into evidence a USIA memorandum that contained a list of newspapers and other publications in which the Agency had advertised job openings during the period at issue in this suit. *See* Pl.Ex. 210. As the agency believed that those publications were appropriate recruitment tools, it is reasonable to infer that applicants for employment at USIA, among them members of the plaintiff class, read those publications. Given the unrebutted showing that these publications were used to advertise for the very jobs at issue in this suit, the fact that this suit involves an applicant class, and the likelihood that readers of the publications include at least some members of the plaintiff class, the Court will order publication of the class notice in these journals and newspapers as well. *See Luevano v. Campbell*, 93 F.R.D. at 76-77 (Court may order publication of class notice in journals and newspapers with readership likely to include class members).

One remaining question is the frequency with which these notices should be published. *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C.1981) is instructive on this point. As in the instant case, in *Luevano* the government had not maintained records from which most class members could be identified. *Id.* at 76. Judge Joyce Hens Green of this Court therefore

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Snider, *Standard Rate and Date of Service: Newspaper Rate and Data*, 544, 549 (Sept.1987).

ordered that defendants publish the class notice once per week for four weeks in 117 newspapers and magazines. *Id.*

Although the potential class in Luevano was significantly larger than plaintiffs' estimate of the potential size of the plaintiff class in this case, *see id.* at 75, the Court believes that newspaper publication once a week for four weeks, including publication on at least one Sunday in each paper with a Sunday edition, is a reasonable method of attempting to reach as many members of the plaintiff class as possible. Publication should begin in the middle of one month, and continue for four weeks, so that any class members who may be out of town during the period of publication will not be prejudiced. The Court believes that publication in four issues of the journals and magazines listed on Plaintiffs' Exhibit 210 is warranted as well. The Court will therefore order defendant to undertake such publication and to provide plaintiff with proof of each publication ordered. Notice must, of course, be of a physical size, appearance, and location within the publication calculated to attract the reader's attention.

Although mailed and published notices are reasonably calculated to reach large segments of the plaintiff class, other efforts to identify class members are warranted as well. Because the evidence suggests that applicants for the jobs at issue in this suit may continue to apply for government employment, *see Transcript* at 425 (Testimony of Stephan Michelson, President, Longbranch Research Associates) ("Michelson Testimony"), notice should be posted in government employment offices. *See, e.g., Luevano v. Campbell*, 93 F.R.D. at 77. Defendant agrees that it should be

required to post a copy of the class notice in all USIA personnel offices and at the Office of Personnel Management. *See Defendant's Post-Trial Reply Brief*, at 5-6. The Court believes that these measures are necessary and proper attempts to notify the maximum possible number of potential class members and will order such postings.

The Court also believes that notice must be posted at all regional OPM offices as well. As the evidence shows that defendant sometimes recruits on a "government-wide" basis, *Transcript* at 196 (Hoxie Testimony), it is not unlikely that some members of the plaintiff class will be among those who check OPM regional offices for vacancy announcements and other information.

Plaintiffs ask, in addition to posted notice, that defendant be ordered to give copies of the class notice to new applicants for jobs at the agency. This proposal is reasonable in light of defendant's contention that some rejected applicants reapply to the agency. *See supra* Section II C. Consequently, the Court will order that, throughout the period in which claims may be brought, defendant provide class notice to all women who apply for jobs with defendant agency.

The evidence points to additional areas in which distribution of class notice would likely lead to identification of class members. The evidence shows that, at least in recent times, defendant tailored some of its recruitment toward agency employees. *See id.* at 196-98 (Hoxie Testimony). Moreover, agency personnel apparently encouraged women who were potentially qualified for the positions at issue to apply for lower-level jobs within the Agency, including clerical positions, so that they might in future be eligible for

promotion to the job categories at issue in this suit. *Id.* at 198. In addition, testimony revealed that some "purchase order vendors" (*i.e.*, contract providers of USIA services) applied or were recruited for the positions in which the Court found defendant liable for sex discrimination. *Id.* at 196 (Hoxie Testimony), 254-55 (Manzo Testimony).

On the basis of these facts, the Court finds that defendant must send class notice, via certified mail, to each and every current female employee and purchase order vendor. Defendant must also search whatever files it maintains on prior employees and purchase order vendors in order to identify any previous female employees or purchase order vendors who unsuccessfully applied for employment within the relevant job categories during the time period relevant to this suit. Defendant must send notice by certified mail to any additional applicants revealed through this search.

Plaintiffs have asked, in addition to these procedures, to take limited discovery of agency officials in order to identify potential class members who were orally encouraged to apply—or discouraged from applying—for the relevant positions. In light of the unrebutted evidence that defendant recruits many employees by word-of-mouth and through other informal channels, *see Transcript* at 258-67 (Manzo Testimony), plaintiff will be permitted to submit interrogatories and requests for production of documents to USIA and VOA selecting officials, and to conduct depositions of these officials. Any such discovery must be designed only to facilitate identification of these potential members of the plaintiff class. *See, e.g., Johnson v. American Airlines, Inc.*, 531 F.Supp.

957, 961 (N.D.Tex.1982); *Frank v. Capital Cities Communications, Inc.*, 88 F.R.D. 674 (S.D.N.Y.1981).

In sum, defendant will be ordered to send class notice by certified mail to all identifiable members of the plaintiff class and to publish class notice in a wide variety of print media sources, all of which are reasonably calculated to reach potential members of the plaintiff class. Defendant will also be ordered to post class notice in its personnel offices and to circulate notice among female employees and job applicants. Plaintiffs will be permitted to conduct limited discovery of defendant's selecting officials in order to identify additional members of the plaintiff class who may have been encouraged to submit applications for employment in the relevant job categories. This broad approach to class-wide notice, while by no means ideal, is the best notice possible under the circumstances of this venerable case.

C. ***The content of the notice must explain the basic facts about this suit, including the definition of the plaintiff class, the Court's finding of liability, the Court's remedial order, and what potential class members must show in order to be eligible for a determination of defendant's liability to each of them.***

Notice to potential members of the plaintiff class must satisfy due process concerns. *See, e.g., Newberg on Class Actions*, §§ 8.22, 8.32. Thus, it must be "reasonably calculated, under all the circumstances, to apprise" potential members of the plaintiff class "of the . . . action and afford them an opportunity to present their [claims]. . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time

for those interested to make their appearance." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

Accordingly, the Notice to Potential Class Members must include the following: a description of the nature of this lawsuit; a statement that the Court found defendant liable for sex discrimination against female applicants for certain positions and by job categories within the Agency; a list of the job titles in which the Court found discrimination and a list of any reclassification of those job titles; notice that the case is now in its remedial phase; and a statement that any female who applied for a job in one of the relevant categories during a period from October 8, 1974, through November 16, 1984, and who was rejected for that position, may be a member of the plaintiff class.

The notice must further state that any woman who believes she falls into this category must obtain and submit a "proof of claim" form. The notice must state that these forms are available from plaintiffs' counsel and the USIA Personnel Officer, as well as USIA and OPM employment offices. The notice must also state that proof-of-claim forms must be returned to *plaintiffs' counsel* within sixty days of the date on which the notice was sent or published. The notice must inform potential plaintiffs that neither the Court nor its Clerk will accept proof-of-claim forms or forward them to plaintiff's counsel.

Finally, the notice must inform potential class members about the process by which individuals can obtain relief. As detailed below, the notice to class members who were not Foreign Service applicants must include a brief and clear description of what

each plaintiff will have to prove in order to recover, of the process through which relief will be determined, and of the possible forms that relief might take. Because the relief to be afforded to Foreign Service applicants is different from the relief available to other members of the plaintiff class, those claimants must receive a different notice form, which must clearly and simply explain this suit, the Court's finding of liability, which Foreign Service applicants are eligible for relief in this suit, the nature of the relief available to them, and the steps that claimants must take next.

The parties have submitted proposed Notices, but neither proposal fully encompasses these points. Accordingly, the Court will order the parties to confer and develop a class notice consistent with this Opinion and submit this proposed Notice to the Court within sixty days of the date of the Order that will accompany this Opinion.

D. ***The proof-of-claim forms must ask plaintiffs to show that they applied for a job within one of the relevant job categories during the relevant time period and that they were rejected.***

Each woman who believes that she is a member of the plaintiff class must submit a "Proof of Claim" form that provides information about her possible class membership. *See, e.g., Harrison v. Lewis*, 559 F.Supp. 943, 946 (D.D.C.1983). The parties agree that the form must ask each potential class member to identify the position sought, when she applied for the position, and a statement that her application was rejected. *See Plaintiffs' Post-Trial Brief* at 29; *Defendant's Post-Trial Reply Brief* at 1. The Court agrees that the Proof of Claim form must request

this information in straightforward terms that do not deter potential class members from submitting a form. The form must also, however, inform potential class members that they will have the burden of proving these facts at the hearing on their individualized claims.

Plaintiffs suggest that the form also ask each respondent to state her name, address, telephone number, and whether she currently wishes to be considered for a position at USIA. The Court agrees that these questions should be included on the form, and it will order that the form include them.

Defendant has argued strenuously and consistently that each class member must prove that she was "minimally qualified" for the job for which she applied and that the proof-of-claim form must ask potential class members to show these minimal qualifications.[14] In light of the previous finding of liability, defendant is incorrect.

To be sure, prior to a finding of liability, a plaintiff bears the burden of proof on all issues, including the burden of showing qualification for the job sought. *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). But once "the employer is a proven discriminator," *McKenzie v. Sawyer*, 684 F.2d 62, 77 (D.C. Cir.1982), there is a *presumption* that its actions against alleged victims of that discrimination were illegal. *Id.*

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[14] By "minimal qualifications" defendant means the minimal qualifications "determined pursuant to Office of Personnel Management Standards." *Defendant's Post-Trial Brief*, at 2-3.

On November 16, 1984, the Court found that defendant had discriminated against women who applied for employment in six broad job categories. As the Supreme Court has put it, in class-wide suits such as this one,

> individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial. . . . *The [plaintiffs] need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proven discrimination. As in Franks [v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976)], *the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.*

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 361-62, 97 S.Ct. 1843, 1868, 52 L.Ed.2d 396 (1977) (emphasis added); *see also, McKenzie v. Sawyer*, 684 F.2d 62, 77 (D.C.Cir.1982); *Harrison v. Lewis*, 559 F.Supp. 943, 946 (D.D.C.1983); *Chewning v. Schlesinger*, 471 F.Supp. 767, 770 (D.D.C.1979). Thus, the proof-of-claim forms for this case may not, and will not, require potential members of the plaintiff class to show or prove their minimum qualifications for the job or jobs for which they applied.

The proposed proof-of-claim form submitted by plaintiffs largely satisfies the requirements set forth in this Opinion and the accompanying Order. The

Court will order the parties to confer to develop an amended form that encompasses all requirements set forth herein and to submit the amended form for the Court's approval when they resubmit the proposed class notice.

The Court will order plaintiffs' counsel to send a copy of the Court-approved proof-of-claim form to each and every respondent to the class notice within ten days after receiving such response. Plaintiffs' counsel will be entitled to reimbursement from defendant for the mailing costs. In addition, the Court will order defendant to make these forms available at all USIA and OPM national and regional personnel offices so that potential class members who see the posted class notice can obtain a proof-of-claim form in the personnel offices as well.

E. ***The claims of class members who were not Foreign Service applicants will be determined through individual Teamster hearings unless the parties can agree on an alternative procedure.***

A decision that an employer has violated Title VII with respect to the rights of an entire class does not, of course, automatically entitle each member of that class to relief. *See, e.g., McKenzie v. Sawyer*, 684 F.2d at 75. Rather, unless the defendant's actions were egregious and pervasive, the finding of discrimination only creates a presumption that each class member is entitled to an individualized hearing at which his or her particular claim to relief can be assessed. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 372, 97 S.Ct. 1843, 1873, 52 L.Ed.2d 396 (1977) (following a determination of liability to a plaintiff class, individual class mem-

bers are entitled to a case-by-case determination of their claims). *Id.* at 372, 97 S.Ct. at 1873; *compare Segar v. Smith*, 738 F.2d 1249, 1290 (D.C.Cir.1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985) (hearings not required "when discrimination has so percolated through an employment system that any attempt to reconstruct individual employment histories would drag the court into 'a quagmire of hypothetical judgments'").

The parties agree that individual hearings, known colloquially as "Teamster hearings," are appropriate for most class members in this case. The Court agrees that, unless the parties can agree on an alternative format, it must order these unwieldy hearings. But because the Court is aware of the enormous disruption these hearings can cause counsel and the Court or its designee, as well as the enormous dedication of resources the hearings require, the Court believes that the interests of justice would best be served if individualized hearings could be avoided. Consequently, the Court will order the parties to consider the relief ordered in *Thompson v. Boyle*, 499 F.Supp. 1147 (D.D.C.1979), *aff'd*, 678 F.2d 257 (D.C.Cir.1982), to confer about the possibility of similar relief in this case, and to inform the Court within thirty days of the date of the Order accompanying this Opinion if some *Thompson*-like resolution of this case is possible. The Court will, however, order *Teamster* hearings, but will vacate this portion of the Opinion and accompanying Order if the parties can agree upon *Thompson*-type relief. The Court will nonetheless outline the method by which *Teamster* hearings will be conducted and the relief available through them.

F. *The Court will determine whether Teamster hearings should be conducted by a United States Magistrate or by one or more Special Masters once class members have submitted proof of claim forms.*

The parties and the Court agree that, given the press of the Court's business, the Court itself should not conduct the *Teamster* hearings. As plaintiffs argue that the number of positive respondents to the class notice will likely be too large for one individual to manage, they ask the Court to appoint several special masters pursuant to Fed.R.Civ.P. 53(a). Defendant counters that the number of positive respondents who will require *Teamster* hearings will be relatively small and within the managerial competence of a single United States Magistrate. Defendant therefore asks the Court to appoint a Magistrate to conduct the hearings pursuant to Rule 53(a) and 28 U.S.C. § 636(b)(2). The Court does not now have sufficient information to decide this matter.

As noted above, there is no precise way in which to determine class size. From the evidence adduced by defendant at trial, it appears that the plaintiff class for five of the six occupational categories in which the Court originally found liability[15] probably exceeds 4,400 members.[16] This figure excludes foreign service

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[15] Because the claims of foreign service officer applicants will be determined by a different procedure, the number of foreign service applicants is irrelevant for purposes of calculating the size of the class that will be entitled to individualized hearings.

[16] The derivation of this number is simple. Defendant showed that in 1984 and 1985, 868 women applied for positions in five of the six occupational categories at issue in this suit,

applicants; moreover, it includes only class members who were minimally qualified for the jobs for which they applied. Because plaintiffs do not bear the burden of showing that they are minimally qualified, *see infra* at 335-336, this estimate is almost certainly too low.

Thus, if even one-fifth of these class members responded positively to the class notice, the task of conducting individualized hearings would exceed the management capacity of one individual. Neither the

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were minimally qualified, and were not hired. *See* Def.Ex. 14 (Longbranch Research Associates, Minimally Qualified Applicants). The Court assumes, for the purposes of its calculations, that the 1984-85 figure is representative of the average number of unsuccessful, minimally qualified female applicants for the jobs at issue in any two-year period. Therefore, the Court divided 868, the number of unsuccessful applicants for the five job categories in 1984-1985, by 2 to arrive at the average number of unsuccessful applicants in each of 1984 and 1985 (434 applicants each year). The Court then multiplied this number by 8 to estimate the number of applicants from 1975 through 1983 (3,472 applicants). As the class opened on October 7, 1974, the Court had to estimate the number of applicants during the months of November and December and from October 7 through October 30, 1974 as well. To do so, the Court divided 434, the average number of applicants per year, by 12 to obtain the average number of unsuccessful applicants per month (36). Thus, in November and December, 1974, there were an estimated 72 unsuccessful applicants. The Court next divided that number by 61, the number of days during that period, to estimate the number of unsuccessful applicants per day in October, 1974 (1.2), and multiplied that number by 24 to estimate the number of unsuccessful applicants from October 7, 1974, when the class opened, through the end of that month (29 applicants). The sum of these numbers is 4,441, the most accurate estimate of the size of the non-foreign service component of the plaintiff class at which the Court can now arrive.

Court nor the parties, however, can now estimate whether one-fifth, four-fifths, or a very small number of class members will see and respond to the class notice. Although Joseph M. Sellers, director of the Legal Employment Opportunity Program at the Washington Lawyers' Committee for Civil Rights Under Law, testified that, in his experience, a large percentage of known class members tend to respond positively to class notice, *Transcript* at 64-66, he did not testify as to the percentage of likely respondents when most class members have not been identified. Thus, Mr. Sellers' testimony, while generally illuminating, shed no light on this specific problem.

The Court must therefore conclude that, on the basis of the facts before it, it cannot estimate the number of positive respondents to the class notice with anything remotely approaching precision. Accordingly, it will reserve decision on whether the *Teamster* hearings should be conducted by a United States Magistrate or by one or more Special Masters. As the Court has ordered that the proof of claim forms be sent to plaintiffs' counsel, the Court will also order that plaintiffs' counsel inform the Court, within thirty days after the last day on which the class notice was published, of the number of positive respondents to the notice. On the basis of that information, the Court will determine whether one Magistrate is capable of conducting the individualized hearings that must be afforded to members of the plaintiff class or whether it must appoint a panel of Special Masters to conduct those hearings.

G. *Burden of Proof at the Teamster Hearings.*

Each claimaint who is entitled to an individualized hearing must show, by a preponderance of the

evidence, that she applied for a job in one of the relevant categories at some time between October 8, 1974, and November 16, 1984, and was rejected. At that point, she will have the benefit of the presumption of discrimination that results from the Court's finding of defendant's liability toward the plaintiff class. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. at 362, 97 S.Ct. at 1868; *Harrison v. Lewis*, 559 F.Supp. 943, 946 (D.D.C.1983).

Defendant will be able to overcome this presumption of discrimination if he can prove, by clear and convincing evidence, that he had a legitimate, non-discriminatory reason for rejecting the claimant's employment application. *See, e.g., Trout v. Lehman*, 702 F.2d 1094, 1107 (D.C.Cir.1983), *vacated on other grounds*, 465 U.S. 1056, 104 S.Ct. 1404, 79 L.Ed.2d 732 (1984); *McKenzie v. Sawyer*, 684 F.2d at 78; *Harrison v. Lewis*, 559 F.Supp. at 946-47. If defendant meets this burden, the claimant must be allowed to offer evidence showing that defendant's alleged non-discriminatory reason for rejecting the claimant's application was merely a pretext for unlawful discrimination. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. at 362, 97 S.Ct. at 1868; *Harrison v. Lewis*, 559 F.Supp. at 946.

The Court must add one point about the way in which evidence must be weighed during these hearings. Because it is impossible to recreate the process that led to rejection of a plaintiff's employment application, "all doubt must be resolved 'against the proven discriminator rather than the innocent [applicant].'" *Id.* at 947, *quoting McKenzie v. Sawyer*, 684 F.2d at 77. Thus, if there is any uncertainty about the

actual reason that defendant rejected a claimant's employment application, that doubt must be resolved against the defendant.

V. REMEDIES FOR SUCCESSFUL INDIVIDUAL CLAIMANTS WHO WERE NOT FOREIGN SERVICE APPLICANTS.

Those claimants who prevail during the *Teamster* hearings are entitled to relief designed to make them whole "for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). To provide full make-whole relief under Title VII, "a court must, as nearly as possible, 'recreate the conditions and relationships that would have been had there been no' unlawful discrimination." *International Brotherhood of Teamsters v. United States*, 431 U.S. at 372, 97 S.Ct. at 1873, *quoting Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769, 96 S.Ct. 1251, 1266, 47 L.Ed.2d 444 (1976). To do so, the Court must, as in any equitable proceeding, "draw on the 'qualities of mercy and practicality that have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" *Teamsters*, 431 U.S. at 375, 97 S.Ct. at 1875, *quoting Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S.Ct. 587, 591-92, 88 L.Ed. 754 (1944).

A. *Plaintiffs are entitled to back pay.*

There is no dispute that, because back pay is fundamental to remedying most forms of employment discrimination, *see, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. at 421, 95 S.Ct. at 2373, successful

claimants must be awarded back pay. In keeping with the remedial, make-whole purpose of back pay, the cut-off date of each back pay award will be the day on which the award is approved for the particular claimant. *See, e.g., Equal Employment Opportunity Commission v. Enterprise Association Steamfitters*, 542 F.2d 579, 590 (2d Cir.1976), *cert. denied sub nom. Rios v. Enterprise Association Steamfitters*, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977).

The parties do not agree on the method for calculating the back pay awards. Plaintiffs suggest construction of a "proxy salary" based on the earnings of persons actually hired for the job in question and still employed by the agency. *Plaintiffs' Post-Trial Brief* at 32. Defendant, in contrast, believes that back pay should be based on "established salary schedules." *Defendant's Post-Trial Reply Brief* at 9-10. Because equity favors the use of proxy salaries, the Court will order that monetary awards be based on hypothetical salary histories.

Since remedies for this plaintiff class must be designed to make plaintiffs financially whole, any back pay award must attempt to place each plaintiff in the monetary position she would have occupied absent discrimination. This need not, and most often cannot, be calculated with exactitude; as long as the award is a just and reasonable estimation of what a plaintiff would have received but for the discrimination, it passes this equitable muster. *See, e.g., Segar v. Smith*, 738 F.2d 1249, 1290 (D.C.Cir.1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir.1974).

It would be difficult to fashion the make-whole relief demanded under Title VII if back pay awards were based on government salary schedules. For one, plaintiffs' awards should reflect salary increases from promotions that would have been likely had they been selected for the position at issue. *See, e.g., Murray v. Weinberger*, 741 F.2d 1423, 1425 (D.C.Cir.1984); *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C.Cir.1976) (per curiam). Whether such promotions would have occurred, when they would have occurred, and how many times they would have occurred would be pure uninformed speculation if the back pay award were based on a salary schedule.

In contrast, if the award were based on a proxy salary constructed from the actual histories of the selectees who remain in agency employ, the Court could gauge the expected frequency and level of promotion more accurately. The unrebutted evidence at trial showed that, in adopting a proxy salary, at least one court explicitly rejected the use of established salary schedules as "considerably more onerous and complicated than following the careers of the selectees and the salaries they earned over a period of time." *Transcript*, at 68-69 (Sellers testimony).

Although the Court is not convinced of the claimed simplicity of the proxy schedules, it fully appreciates the complications that would follow if back pay awards were based on government salary schedules. Not only would the Master or Magistrate have to guess about promotions, overtime, and other non-standardized elements of compensation, he or she would have to make a separate calculation of the monetary award due each claimant. In contrast, construction of proxy

salary schedules would allow the Master or Magistrate to make calculations for each job, rather than for each applicant.

Because equity and efficiency favor use of the proxy salary, the Court will order that back pay awards be calculated with reference to a representative salary determined for each position at issue. This salary will be based on the average salaries actually paid to persons currently employed by the agency who were hired into positions similar to the one that the class member would have filled absent discrimination. The proxy salary will be calculated for each year, so that the Master or Magistrate will not have to engage in a multitude of individualized calculations.

In addition to back salary, victims of discrimination are entitled to the monetary value of fringe benefits in their back pay awards. *See, e.g., Crabtree v. Baptist Hospital of Gadsen, Inc.*, 749 F.2d 1501 (11th Cir.1985); *Snead v. Harris*, 23 Empl.Prac.Dec. P 30,927 (D.D.C.1980) [Available on WESTLAW, 1980 WL 144]. Among the fringe benefits whose monetary value could be included in the back pay award are vacation leave, sick leave, and medical coverage. *See, e.g., Moysey v. Andrus*, 22 Empl.Prac.Dec. ¶ 30,834 (D.D.C.1980) [Available on WESTLAW, 1980 WL 122]. Similarly, back pay awards must include the value of overtime and shift differentials, if the successful plaintiff would have been eligible for these salary incentives had she been awarded the job at issue. *Id.* The Master or Magistrate will be responsible for determining what fringe benefits should be added to the back salary calculation, how to value those fringe benefits, whether the plaintiff is entitled to the

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monetary value of overtime or shift differentials in her award and, if so, what that value should be.

B. *Plaintiffs who request employment with the Agency but cannot be hired immediately are eligible for front pay as well.*

Front pay "compensates plaintiffs . . . for the fact that the wrongs for which they are entitled to receive back pay cannot be righted without delay." *Thompson v. Sawyer*, 678 F.2d 257, 292 (D.C.Cir.1982). It is possible that defendant cannot immediately provide every claimant who requests and is eligible for agency employment a job comparable to the one that she would have occupied absent discrimination. If so, the claimant is eligible for "front pay" in addition to her back pay award. *See, e.g., id.* at 290.

Front pay must be calculated according to the formula used to determine the back pay awards. *Id.* at 292. Because front pay should "be cut off when the wrong has ended," *id.* at 293, the Court will order the Master or Magistrate to provide front pay, if appropriate, either until the claimant receives an appropriate position with the agency or until a date certain, based on an estimate of the period it should take the individual to find employment, the claimant's work expectancy, and her life expectancy. *See, e.g., Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 956-58 (10th Cir.1980).

C. *Class members were obligated to make reasonable efforts to mitigate damages, and the monetary awards must be reduced by the mitigating earnings.*

Title VII mandates that "back pay otherwise allowable" be reduced by "[i]nterim earnings or amounts

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earnable with reasonable diligence by the person . . . discriminated against." 42 U.S.C. § 2000e-5(g). Thus, the Court must order that all back pay awards be reduced by amounts that claimants earned or could have earned "with reasonable diligence." *See, e.g., Ford Motor Co. v. Equal Employment Opportunity Commission*, 458 U.S. 219, 231, 102 S.Ct. 3057, 3065, 73 L.Ed.2d 721 (1982); *Clark v. Marsh*, 665 F.2d 1168, 1172 (D.C.Cir.1981).

Plaintiffs are not, however, required to mitigate damages by accepting employment beneath their skills. *See, e.g., Ford Motor Co. v. EEOC*, 458 U.S. at 231-32, 102 S.Ct. at 3065; *Graham v. Adams*, 640 F.Supp. 535, 541-42 (D.D.C.1986). What a plaintiff must show, and what will be imputed to each plaintiff, is a reasonable effort to find a position "substantially equivalent" to the one denied her, and the reasonableness of that effort will depend upon the individual characteristics of the plaintiff, the type of job, and the job market. *See, e.g., Rasimas v. Michigan Department of Mental Health*, 714 F.2d 614, 624 (6th Cir.1983), *cert. denied*, 466 U.S. 950, 104 S.Ct. 2151, 80 L.Ed.2d 537 (1984).

Once the Master or Magistrate finds that a claimaint is entitled to a make-whole monetary award, and plaintiff has presented evidence on damages, the defendant has the burden of producing evidence to show interim earnings or lack of diligence. *Id.*; *see also, Marks v. Prattco, Inc.*, 633 F.2d 1122, 1125 (5th Cir.1981) (per curiam); *Sangster v. United Airlines, Inc.*, 633 F.2d 864, 868 (9th Cir.1980), *cert. denied*, 451 U.S. 971, 101 S.Ct. 2048, 68 L.Ed.2d 350 (1981); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 937 (10th Cir.1979); *Taylor v. Philips Industries, Inc.*,

593 F.2d 783, 787 (7th Cir.1979). To do so, defendant must show that a substantially equivalent position was available and that the claimant either turned down or failed to exercise reasonable diligence to find such a position. *Rasimas v. Michigan Department of Mental Health*, 714 F.2d at 624.[17]

D. *Plaintiffs who request positions with the Agency are eligible for hiring priorities and retroactive promotions.*

Because Title VII "requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination," *Franks v. Bowman Transportation Co.*, 424 U.S. at 764, 96 S.Ct. at 1264, members of the plaintiff class who are entitled to relief are also entitled to hiring priorities and retroactive appointment. *See, e.g., Local 28, Sheet*

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[17] Plaintiffs maintain that unemployment compensation is not deductible from a back pay award. *See Plaintiffs' Post-Trial Brief*, at 37. The Court is puzzled about the relevance of unemployment compensation to the discrimination at issue in this case. Because the plaintiff class is an *applicant* class, and unemployment compensation is provided only when employment is terminated, plaintiffs would not have been eligible for unemployment compensation as a result of defendant's actions. The Court realizes that some plaintiffs may have been discriminatorily denied employment with the defendant agency while they were receiving unemployment insurance payments as a result of an earlier job termination. Those payments are not deductible from any back pay award. *See National Labor Relations Board v. Gullett Gin*, 340 U.S. 361, 364, 71 S.Ct. 337, 339-40, 95 L.Ed. 337 (1950). The Court does not now decide, of course, that unemployment compensation received by a Title VII claimant *as a result of a discriminatory termination* is exempt from the general mitigation requirement.

Metal Workers v. Equal Employment Opportunity Commission, 478 U.S. 421, 106 S.Ct. 3019, 3049, 92 L.Ed.2d 344 (1986) (retroactive appointment); *Franks v. Bowman*, 424 U.S. at 770-80, 96 S.Ct. at 1267-71 (hiring priorities); *Harrison v. Lewis*, 630 F.Supp. 212, 215 (D.D.C.1986).

Accordingly, the Agency will be ordered to offer a hiring priority to any class member who is eligible for relief and who currently requests a position with the Agency. Her appointment date will be retroactive to the date on which she would have been hired absent the discrimination, thereby ensuring that the relief afforded to that plaintiff compensates for the differences in seniority that would ordinarily have resulted from defendant's discriminatory actions.

VI. RELIEF FOR FOREIGN SERVICE APPLICANTS TO THE UNITED STATES INFORMATION AGENCY.

A. *The Court will model the relief for Foreign Service applicants to the United States Information Agency on the consent decree in Palmer v. Shultz.*

As detailed above, among those entitled to relief are women who unsuccessfully applied for Foreign Service positions within the United States Information Agency during the period relevant to this suit. Plaintiffs maintain, and the Court agrees, that, the remedy for these class members must be tailored to the special process by which Foreign Service officers are hired.[18] The Court believes that the remedy for

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[18] Foreign Service Officer candidates must take a written examination for the foreign service. If their score is above the passing grade set for a particular agency that employs Foreign

Foreign Service applicants must be designed to ensure that those women most likely to merit appointment as Foreign Service officers achieve that goal within a reasonable time and with no more than a reasonable cost and burden upon defendant.

At trial, Frontiss B. Wiggins, the State Department official charged with implementing the consent decree in *Palmer v. Shultz*, a sex discrimination suit brought against the Department of State, testified that the consent decree established a workable and extremely successful process for reevaluating and hiring women who had been previously rejected for Foreign Service positions at the Department of State. *Transcript*, at 81-85; *see also*, Pl.Ex. 217 ("Fifth Report of the Board of Examiners for the Foreign Service"), 233 (Memo from Robinson to Hackett re ICA Practice in Selection of Minority Junior Foreign Service Officers). As such, the consent decree in *Palmer v. Shultz* points toward an appropriate remedy for Foreign Service applicants who are members of the plaintiff class in this suit.

The *Palmer* method forces the Foreign Service examiners to reevaluate the most promising of unsuccessful female applicants to the Foreign Service. In *Palmer*, the State Department obtained Foreign Ser-

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Service Officers, they proceed to "Oral Assessment Panels." Candidates who pass muster before those panels must undergo detailed medical and security checks. Once a candidate has survived these various reviews, his or her application, test scores, and background checks are reviewed by a "Final Review Panel." Only if approved by that panel is the candidate eligible for a Foreign Service position in the agency whose section of the written examination they passed. *See* 22 C.F.R. §§ 11.1-11.6 (1987).

vice written examination scores for rejected female applicants throughout the relevant time period. *Transcript*, at 80-81. The Department then offered women with the highest written scores an opportunity to participate again in the Oral Assessment part of the Foreign Service Officer selection procedure. *Id.* at 80. Those class members who chose to participate were evaluated alongside all other Foreign Service candidates. *Id.* at 106; *see also*, Pl.Ex. 204 (*Palmer* consent decree). Class members who succeeded in the Oral Assessment phase were then subjected to the medical and security checks through which all Foreign Service candidates must go. *Transcript* at 106; Pl.Ex. 204.

Class members who survived these screenings were evaluated separately from "regular" Foreign Service applicants in the last stage of review. Applications of *Palmer* class members who survived to this stage of the reexamination process were there evaluated *only* with respect to the application of other *Palmer* class members. The reviewing panel was specifically instructed that background and Oral Assessment performance should be particularly important in this final review. *Id.* The seventy-five top scorers were offered Foreign Service Officer positions. *Transcript* at 91; Pl.Ex. 204.

The unrebutted evidence before the Court reveals that the *Palmer* method efficiently produced Foreign Service Officers who are expected to fare at least as well in their careers as Foreign Service Officers chosen through the usual means. *Transcript* at 82. Accordingly, the Court will base the remedy for Foreign Service applicants to the USIA on the *Palmer* decree.

As in *Palmer*, defendant will be ordered to obtain a list of the names, addresses, and examination scores of women who applied to the Foreign Service between October 8, 1974, and November 16, 1974. Defendant will be ordered to create a rank-order list, for each year at issue, of the women who unsuccessfully applied for Foreign Service Officer positions at USIA or, for the years in which all Foreign Service applicants took one joint examination, a rank-order list of women who failed the USIA "cones" on the Foreign Service exam.

As in *Palmer*, defendant will be ordered to invite class members, in descending order of examination scores, to compete alongside current Foreign Service applicants in the Oral Assessment process. This written invitation must also serve as class notice to Foreign Service applicants, and must inform these class members of the nature of the suit, this Court's finding of liability, and the procedures for obtaining relief available to these class members.

Those class members who survive the Oral Assessment would then be subjected to the medical and security checks that successful Foreign Service applicants ordinarily undergo. Again as in *Palmer*, class members who survive those checks would be compared by the Final Review Panel only to other class members, not other Foreign Service candidates.

Defendant will be ordered to create a rank-order list of class members who survive the full Foreign Service assessment process. A number of Foreign Service appointments each year will be made from this special register of eligible Foreign Service Officers. Plaintiffs ask the Court to order that a maximum of twenty-five appointments per year, and a

total of seventy-five appointments, be made from this special register.

The Court, however, does not know how many Foreign Service Officers are appointed to USIA each year or whether the agency would argue, and be able to show, that twenty-five appointments per year would be inappropriate. Accordingly, the Court will order the parties to confer with respect to these remedial measures. The Court will also order the parties to submit joint or separate memoranda addressing the agency's ability to process and absorb seventy-five Foreign Service Officers from the plaintiff class over a three-year period. These briefs will be due within sixty days from the date of the Order accompanying this Opinion.

VII. THE COURT WILL NOT ORDER PROSPECTIVE RELIEF.

Plaintiffs have asked the Court to order prospective relief to correct allegedly continuing discrimination at the defendant agency. Specifically, plaintiffs ask the Court to order defendants to engage an outside expert to study recruitment and hiring at the agency and to recommend steps necessary to correct any discrimination revealed by those studies. Plaintiffs also ask the Court to impose a hiring goal to increase the representation of women in the Electronics Technician Series (series 856). The Court must deny these requests.

The Court has broad remedial power to order appropriate affirmative action if the trial record reveals that such prospective relief is necessary to correct continuing discrimination. *See, e.g., Local 28, Sheet Metal Workers Int'l Ass'n v. Equal Employ-*

ment Opportunity Commission, 478 U.S. 421, 106 S.Ct. 3019, 3034-50, 92 L.Ed.2d 344 (1986). To that end, the Court must consider both defendant's history of discrimination and whether discrimination has continued after the defendant was made aware of its unlawful behavior. *See, e.g., Berkman v. City of New York*, 812 F.2d 52, 62 (2d Cir.1987). Absent convincing contrary evidence, the Court will not find that defendant continued to discriminate after the illegality of its practices was made clear by the Court's 1984 finding of discrimination. *Id.*; *see also Firefighters Inst. for Racial Equality v. City of St. Louis*, 616 F.2d 350, 364 (8th Cir.1980), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981).

Plaintiffs' request for propsective relief relies on the testimony of Dr. Bernard R. Siskin, Vice President of National Economic Research Associates, Inc. Dr. Siskin updated the pre-1980 statistical evidence on which the Court relied in its 1984 finding of liability. *Transcript* at 128-37. Dr. Siskin's data reveal that, from 1979 through 1985, there was a statistically significant shortfall in the number of women employed or offered employment in four of the job categories at issue in this suit compared to the number of women potentially available for those jobs in the relevant labor market (*i.e.*, the "availability pool"). *See* Pl.Ex. 190(a), (b); 192(a), (b); 196(a), (b); 197(a), (b); and 236(a), (b).

Plaintiffs maintain that, in light of the finding of liability and the unabated discrimination shown by Dr. Siskin, they are entitled to an inference of continuing discrimination. With respect to defendant's hiring practices, any such presumption is effectively rebutted by the statistical evidence offered by defen-

dant. Looking not at hypothetical availability pools but at actual employment practices at the defendant agency, defendant showed that statistical analysis does not support an inference of discrimination in the frequency with which the agency offers employment to minimally qualified women. *See* Def.Ex. 7, 16-18.

The picture is not as clear with respect to recruitment. As defendant's data examine the treatment afforded to applicants only after they are designated "minimally qualified," the data do not rebut plaintiffs' statistical evidence. But, taken as a whole, the record offers other compelling reasons for denying prospective relief in the recruitment area.

First, the process whereby applicants for certain jobs are designated "minimally qualified" for most jobs at issue is largely objective. *Transcript* at 194-96 (Hoxie testimony). This is less true of the process for candidates to the radio broadcaster job series. *Id.* at 251-59 (Manzo testimony). But it is precisely those radio broadcaster job series in which plaintiffs' own statistics reveal improvement in hiring women after the Court's 1984 finding of liability. *See* Pl.Ex. 192(a), (b); 236(a), (b). The Court can only regard this evidence as showing that the agency has made a successful, good-faith effort to end discriminatory treatment of women in its subjective (and objective) employment practices. There is no evidence to support any assertion that this effort will not continue in future with even greater success. As the Court cannot find an adequate basis in the record for the requested prospective relief, it must deny plaintiff's request.

VIII. THE COURT WILL RESERVE JUDGMENT ON PLAINTIFFS' REQUEST FOR ATTORNEY'S FEES.

Plaintiffs have asked the Court to order an interim award of attorney's fees and to find that individual claimants are entitled to attorney's fees for representation at *Teamster* hearings as long as those claims were not patently frivolous. Defendant has asked the Court to defer ruling on questions relating to fee awards until the parties have had an opportunity to discuss and try to resolve the issue. The Court agrees that resolution of these matters by consent is far preferable to resolution by court order and it will therefore defer ruling on plaintiffs' request for thirty days from the date of the Order accompanying this Opinion. At the end of that period, plaintiffs may renew their request for interim fees or for a determination that individual claimants are entitled to fee awards for representation at the *Teamster* hearings.

IX. CONCLUSION.

In this Opinion and the accompanying Order, the Court sets forth a concrete plan for remedying victims of the United States Information Agency's ten-year policy of discriminating against women who applied for jobs in six broad categories of employment. This Opinion details the steps that must be taken in the near future to assure that each plaintiff receives her due.

First, the agency must undertake a comprehensive effort to notify potential class members that they can finally obtain a remedy for the discriminatory decision to deny them employment. Those class members

who were not applicants to the foreign service are eligible for individualized determinations of their claims and, if they succeed in those individualized hearings, may receive monetary awards as well as hiring priorities. Foreign service applicants will, by virtue of the competitive examination required for entry into the Foreign Service, obtain relief through a process designed both to remedy discrimination and ensure that the tradition of excellence so essential to our nation's foreign service remains uncompromised.

There remain some unsettled issues in this case. Most prominently, the Court has asked the parties to try to reach some resolution that would avoid the need for individualized hearings. Assuming such hearings are necessary, the Court will defer decision on whether the individualized hearings to be afforded to much of the plaintiff class will be conducted by Special Masters or a United States Magistrate sitting as a Master. Finally, the Court will defer consideration of plaintiffs' request for attorney's fees.

The Court will issue an Order, of even date herewith, memorializing these findings of fact and conclusions of law.

ORDER

On November 16, 1984, this Court found defendant liable for sex discrimination in six broad job categories within the United States Information Agency ("the agency"). In accordance with that Opinion, and with the Opinion of even date herewith setting forth a remedial scheme for implementing that 1984 decision, and for the reasons set forth therein, it is this 16th day of January, 1988,

ORDERED that any and all documents sent to class members in this case shall refer to the job categories at issue in this suit by their current and former titles and Job Series numerical designations; and it is

FURTHER ORDERED that defendant's motion for summary judgment on the claims of women who had applied for foreign service positions at the agency shall be, and hereby is, denied in all respects except that women who actually sought relief under the consent decree in *Palmer v. Shultz*, Civil Action No. 76-1439, shall not be eligible for relief in this suit; and it is

FURTHER ORDERED that a woman who submitted multiple applications for the jobs at issue in this suit during the time period relevant to this suit and was rejected for at least one such position shall be a member of the plaintiff class notwithstanding any later offers of employment from the agency; and it is

FURTHER ORDERED that a woman who applied for a position at issue in this suit during the time period relevant to this suit shall be a member of the plaintiff class notwithstanding the fact that defendant

hired another woman for the job for which she applied; and it is

FURTHER ORDERED that a female non-resident alien who applied for a job at issue in this suit, which was to be performed within the territorial boundaries of the United States, during the time period relevant to this suit shall be a member of the plaintiff class; and it is

FURTHER ORDERED that the plaintiff class shall open on October 8, 1974; and it is

FURTHER ORDERED that the plaintiff class shall close on November 16, 1984; and it is

FURTHER ORDERED that defendant shall bear the full expense of notifying potential members of the plaintiff class about this lawsuit and the remedies available thereunder; and it is

FURTHER ORDERED that defendant shall send notice, by certified mail, to each and every female who applied for the non-foreign-service jobs at issue in this suit during the relevant time period and who can be identified by a search through defendant's files; and it is

FURTHER ORDERED that defendant shall mail such notices within thirty days of the date on which the Court approves class notice; and it is

FURTHER ORDERED that defendant shall publish the class notice to the non-foreign-service-applicant component of the plaintiff class in: (a) the largest newspaper in each of the eighteen largest Standard Metropolitan Statistical Areas in the country; and (b) all newspapers and other publications listed on Plaintiffs' Exhibit 210; and it is

FURTHER ORDERED that defendant shall publish such notices once per week for four weeks in each of the above-mentioned newspapers, including publication on at least one Sunday in newspapers that have a Sunday edition. This publication shall begin in the middle of the month and continue for four weeks thereafter; and it is

FURTHER ORDERED that defendant shall publish such notices in four issues of the above-mentioned journals; and it is

FURTHER ORDERED that such published notices shall be of a physical size, appearance, and location within the newspaper or journal calculated to attract the reader's attention; and it is

FURTHER ORDERED that such publications shall begin within thirty days of the date on which the Court approves class notice; and it is

FURTHER ORDERED that defendant shall ensure that class notice for the non-foreign-service-applicant component of the plaintiff class is posted in all United States Information Agency and Voice of America personnel offices, as well as the national and all regional offices of the Office of Personnel Management; and it is

FURTHER ORDERED that such notices shall be posted within thirty days of the date on which the Court approves class notice; and it is

FURTHER ORDERED that defendant shall give a copy of class notice for the non-foreign-service-applicant component of the plaintiff class to all women who apply for employment at the agency; this obligation shall begin within three days after the Court approves class notice and shall continue throughout the

period in which potential members of the plaintiff class may submit proof-of-claim forms; and it is

FURTHER ORDERED that defendant shall send class notice for the non-foreign service applicant component of the plaintiff class, via certified mail, to each and every current female employee and purchase order vendor within thirty days after the Court approves class notice; and it is

FURTHER ORDERED that defendant shall search any and all files maintained on former employees and former purchase order vendors in order to identify any former female employees or purchase order vendors who unsuccessfully applied for employment within the relevant non-foreign-service job categories during the time period relevant to this suit; and it is

FURTHER ORDERED that defendant shall send class notice, via certified mail, to any such unsuccessful applicants for the non-foreign-service jobs at issue in this suit within thirty days after the Court approves class notice; and it is

FURTHER ORDERED that plaintiffs shall be permitted to submit interrogatories and requests for production of documents to United States Information Agency and Voice of America selecting officers and to conduct depositions of such officials. This discovery shall be designed only to facilitate identification of potential members of the plaintiff class who were orally encouraged to apply, or orally discouraged from applying, for the jobs at issue in this suit during the time period relevant to this suit; and it is

FURTHER ORDERED that class notice provided to non-foreign-service applicants shall include the following: (a) a description of the nature of this lawsuit; (b) a statement that the Court found defendant liable for sex discrimination against female applicants for certain positions and by job categories within the Agency; (c) a list of the job titles and series numbers in which the Court found discrimination and a list of any reclassification of those job titles and numerical designations; (d) a statement that the case is now in the remedial phase; (e) a statement that any woman who applied for a job in one of the relevant categories during a period from October 8, 1974, through November 16, 1984, may be a member of the plaintiff class; (f) a statement that any woman who believes she may be a member of the plaintiff class must obtain a "proof of claim form" from plaintiffs' counsel or a USIA, VOA, or OPM personnel office and must submit a completed proof-of-claim form to plaintiffs' counsel by a date certain; and (g) the process whereby class members can obtain relief and a description of the types of relief that may be available; and it is

FURTHER ORDERED that class notice provided to foreign service applicants shall include the following: (a) a description of the nature of this lawsuit; (b) a statement that the Court found defendant liable for sex discrimination against female applicants for certain positions and by job categories within the Agency; (c) a list of the job titles and series numbers in which the Court found discrimination and a list of any reclassification of those job titles and numerical designations; (d) a statement that the case is now in the remedial phase; (e) a description of the foreign

service applicants who are eligible for relief; (f) the process through which relief for foreign service applicants will be determined and the nature of the relief available; and (g) the steps that potential foreign service applicant-claimants must take next; and it is

FURTHER ORDERED that the parties shall confer to develop class notices consistent with this Opinion and shall submit these proposed notices to the Court within sixty days of the date of this Order; and it is

FURTHER ORDERED that the "proof-of-claim" forms to be submitted in this case shall ask the following of each non-foreign-service claimant: (a) what position she sought; (b) the approximate date on which she applied for the job; (c) a statement that her application was rejected; (d) name, address, telephone number, and whether she currently wishes to be considered for a position at USIA or VOA. In addition, the proof-of-claim form shall inform potential claimants that they will have the burden of proving that they applied and were rejected for a position at issue in this suit during the time period relevant to this suit. The proof-of-claim form shall not state that claimants have the burden of showing that they were "minimally qualified," according to OPM standards, for the jobs for which they applied; and it is

FURTHER ORDERED that the parties shall confer to develop a proof-of-claim form that meets the requirements set forth herein and shall submit this proposed form to the Court when they submit proposed Class Notice; and it is

FURTHER ORDERED that plaintiffs' counsel shall send a copy of the Court-approved proof-of-claim form to each and every non-foreign-service respondent to the class notice within ten days after receiving such response; and it is

FURTHER ORDERED that plaintiff shall be entitled to reimbursement from defendant for the cost of those mailings; and it is

FURTHER ORDERED that the parties shall confer about the possibility that relief similar to that ordered in *Thompson v. Boyle*, 499 F.Supp. 1147 (D.D.C.1979), *aff'd*, 678 F.2d 257 (D.C.Cir.1982) might be appropriate in this case and shall inform the Court in writing, within thirty days of the date of this Order, if *Thompson*-type relief is possible in this case. The parties shall at that time submit either a proposal for the scope and contours of that relief, an abbreviated briefing schedule addressing issues that the parties cannot resolve, or a joint statement explaining why such relief may not be ordered in this case; and it is

FURTHER ORDERED that, if the parties inform the Court that *Thompson*-type relief is possible in this case, and the Court concurs with that assessment, the Court will vacate the portions of this Order setting forth the process and type of relief available to non-foreign-service-applicant members of the plaintiff class and will consider the scope and contours of the alternative *Thompson*-type relief; and it is

FURTHER ORDERED that, unless the parties inform the Court that *Thompson*-type relief is possible in this case, each potential member of the plaintiff class who submits a proof-of-claim form shall

receive an individualized hearing on her claim; and it is

FURTHER ORDERED that, within thirty days after the last day on which class notice is published, plaintiffs shall inform the Court of the number of positive respondents to the class notice; and it is

FURTHER ORDERED that the Court shall, on the basis of the number of positive respondents to the class notice, determine whether individualized hearings shall be conducted by a United States Magistrate or by one or more Special Masters; and it is

FURTHER ORDERED that each claimant who is entitled to an individualized hearing must prove at that hearing, by a preponderance of the evidence, that she applied for a position at issue in this suit during the time period relevant to this suit and that she was rejected for that position. Any plaintiff who so proves shall be entitled to a presumption that she was not hired because of discrimination on the basis of sex; and it is

FURTHER ORDERED that defendant shall be able to overcome that presumption by proving, by clear and convincing evidence, that he had a legitimate, non-discriminatory reason for rejecting the claimant's application; and it is

FURTHER ORDERED that the claimant must be allowed to offer evidence designed to show that any proffered legitimate, non-discriminatory reason for defendant's action was a pretext for discrimination; and it is

FURTHER ORDERED that claimants who prevail at an individualized hearing shall be entitled to "make-whole" relief, including back pay, and, if

appropriate, front pay, retroactive promotion, and hiring priorities if any claimant currently wishes to be considered for employment at the agency; and it is

FURTHER ORDERED that the cut-off date for any back pay award shall be the day on which the award is approved for the particular claimant; and it is

FURTHER ORDERED that back pay shall be calculated on the basis of a "proxy salary" to be constructed by the Magistrate or Master in charge of the individualized hearings on the basis of the average earnings and promotions history of persons hired for each job at issue in this suit and still employed by defendant; and it is

FURTHER ORDERED that the Master or Magistrate who establishes these "proxy salaries" shall calculate these salaries for each year at issue in this suit; and it is

FURTHER ORDERED that back pay shall include the monetary value of fringe benefits and the value of any overtime or shift differentials that each claimant would have been eligible to receive had she not been the victim of discrimination; and it is

FURTHER ORDERED that the Master or Magistrate who conducts the individualized hearing shall submit to the Court for its approval an analysis of what fringe benefits should be included in back pay, how to value those fringe benefits, whether a claimant is entitled to the monetary value of overtime or shift differentials and, if so, what that value is; and it is

FURTHER ORDERED that front pay shall be calculated by the same formula used to determine the back pay awards; and it is

FURTHER ORDERED that a claimant who prevails in the individualized hearing and wishes to be considered for employment at the agency shall receive front pay, if no appropriate job is currently available, either until she receives an appropriate position at the agency or until a date certain, based on an estimate of the period it should take the individual to find employment, the claimant's work expectancy, and her life expectancy; and it is

FURTHER ORDERED that all back pay awards shall be reduced by the amounts that a claimant earned or could have earned with reasonable diligence in a position substantially equivalent to the one denied her; and it is

FURTHER ORDERED that, once a claimant has presented evidence on damages at the individualized hearing, defendant shall have the burden of producing evidence to show interim earnings or lack of diligence in light of the existence of a substantially equivalent position that the claimant either turned down or failed to find; and it is

FURTHER ORDERED that any unemployment compensation that a claimant may have received as a result of a job termination prior to applying for a job at issue in this suit shall not be considered earnings that mitigate damages awardable to the claimant; and it is

FURTHER ORDERED that defendant shall, within sixty days of the date of this Order, obtain a list of the names, addresses, and foreign service examination scores of women who applied to the Foreign Service between October 8, 1974, and November 16, 1984, and were rejected; and it is

FURTHER ORDERED that defendant shall create a rank-order list of the women who unsuccessfully applied for Foreign Service Officer positions at the agency, or who failed the USIA "cone" of the joint Foreign Service exam, between October 8, 1974, and November 16, 1984; and it is

FURTHER ORDERED that defendant shall invite some portion of these women, through the class notice, in descending order of examination scores, to compete alongside current Foreign Service applicants in the Oral Assessment process; and it is

FURTHER ORDERED that those claimants who pass the Oral Assessment process shall undergo the Medical and Security checks that Foreign Service candidates ordinarily undergo; and it is

FURTHER ORDERED that those claimants who survive the Medical and Security checks shall be reviewed by the Final Review Panel but shall be compared only to each other by the Final Review Panel; and it is

FURTHER ORDERED that the parties shall confer about the number of Foreign Service applicant-class members that should be invited to participate in the remedial process outlined above and who could, if successful, be absorbed over a reasonable time period by the agency; and it is

FURTHER ORDERED that, within sixty days of the date of this Order, the parties shall submit briefs to the Court outlining the areas of agreement and disagreement about the number of jobs to be made available for Foreign Service applicant-class members and the number of Foreign Service applicant-

class members that should be invited to participate in this reassessment process; and it is

FURTHER ORDERED that, on the basis of the record before the Court, no prospective relief is available in this case; and it is

FURTHER ORDERED that the Court will reserve ruling on plaintiffs' request for attorney's fees so that the parties may have an opportunity to discuss and resolve this issue; and it is

FURTHER ORDERED that, if necessary after such discussions, plaintiffs may renew their requests for interim attorney's fees or for a determination that individual claimants are entitled to fee awards for representation at the individualized hearings.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 77-2019

CAROLEE BRADY HARTMAN, ET AL., PLAINTIFFS

v.

CHARLES Z. WICK, DEFENDANT

[Filed: Apr. 15, 1988]

OPINION

CHARLES R. RICHEY, District Judge.

INTRODUCTION

On January 16, 1988, the Court issued a comprehensive Opinion and Order setting forth the remedies to which the plaintiff class is entitled in this case. *See Hartman v. Wick*, 678 F.2d 312 (D.D.C.1988). Defendant has now asked the Court to reconsider two facets of that decision. Neither law nor equity supports defendant's position, and the Court must therefore deny defendant's motion.

THE COURT PROPERLY FOUND THAT PLAINTIFFS DO NOT HAVE THE BURDEN OF PROVING THEIR MINIMUM QUALIFICATIONS FOR THE JOBS AT ISSUE IN THIS SUIT.

Because defendant had already been found liable for discriminating against members of the plaintiff class, *see Hartman v. Wick*, 600 F.Supp. 361 (D.D.C.1984), the Court found that plaintiffs do not have to demonstrate their minimum qualifications for the jobs at issue in this suit as a prelude to any recovery. *See Hartman v. Wick*, 678 F.Supp. at 332-33. Rather, the Court found that defendant may show that a particular plaintiff is not entitled to recover because, *inter alia*, she did not possess the minimum qualifications for the job for which she applied. *See id.* at 333, 335. Defendant asks the Court to reconsider this finding, but there is no basis on which to do so.

In the seminal case of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court clearly stated the law that governs a plaintiff's burden at the post-liability remedial stage of litigation:

> The proof of the pattern or practice [of discrimination] supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The [plaintiff] need only show that any alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination.

Id. at 362. Thus, under *Teamsters*, plaintiffs at the remedial stage of a discrimination suit do not have the

burden of proving their qualifications, minimal or otherwise, for the job for which they applied. *See also, e.g., Thompson v. Sawyer*, 678 F.2d 257, 286 (D.C.Cir.1982); *Harrison v. Lewis*, 559 F.Supp. 943, 946-47 (D.D.C.1983); *Chewning v. Schlesinger*, 471 F.Supp. 767, 771 (D.D.C.1979).

Defendant maintains that the reasoning in *Teamsters* is inapplicable to this case. First, defendant argues that the *Teamsters* standard applies only to persons already employed by the discriminator. This is not true.

In *Teamsters*, the Supreme Court spoke to the information that nonapplicants, applicants, and employees must adduce or prove at the remedial stage of a discrimination suit. Only nonapplicants who claimed that defendant's discriminatory policies deterred them from applying for the jobs at issue were required to provide any information to the defendant; they must give the defendant whatever information they would have provided on an employment application. In contrast, neither applicants nor employees were required to provide any information to the defendant. Moreover, neither nonapplicants, applicants, nor persons already hired by the defendant were required to prove their qualifications for employment. *See International Bhd of Teamsters v. United States*, 431 U.S. at 362, 369, & 369 n. 53.

Thus, there is no support for defendant's proposition. *Teamsters* speaks directly to the question whether a plaintiff must prove qualifications, at the post-liability remedial phase of a discrimination case. The clear answer is that a plaintiff does not have that burden.

Second, defendant implies that the *Teamsters* case, which involved discrimination among applicants and recruits for positions as motor freight drivers, should not be applied to applicants for the heterogeneous technical jobs at issue in this suit. The Court must note that, in contrast to defendant's elitist implication that there are no "minimum qualifications" for motor freight drivers, drivers must at a minimum have or be able to obtain a valid license for driving a motor freight vehicle. Moreover, the Court is hard pressed to understand why the fact that there are six job categories at issue in this suit, some of which require technical skills, leads to the conclusion that the clear and unqualified language of the *Teamsters* case is inapposite.

What the Court clearly realizes, however, is that defendant may have difficulty showing lack of qualification because he has not retained applicant files for most of the ten-year period at issue in this suit. While the Court has not subjected defendant to penalty because of this routine destruction of files, it cannot allow the lack of information resulting from defendant's practices to affect the legal requirements governing this suit. If the defendant-discriminator faces difficulties, they are difficulties of his own making, and the law cannot penalize the innocent victims of his discrimination simply in order to ease his tasks.

THE REMEDIAL SCHEME DEVELOPED FOR CLASS MEMBERS WHO WERE FOREIGN SERVICE OFFICER APPLICANTS IS BOTH EQUITABLE AND LEGALLY JUSTIFIED.

Among the class members entitled to relief in this suit are women who unsuccessfully applied for Foreign Service Officer positions within the United States Information Agency during the time period relevant to this suit. *See Hartman v. Wick*, 678 F.Supp. at 338. Because Foreign Service Officer candidates must compete for their positions through the Foreign Service Officer examination process, *see id.* at 339 n. 18, the Court found that the individualized remedial hearings approved in *International Bhd of Teamsters v. United States*, 431 U.S. 324, 372, were not an appropriate remedial tool in this case. Rather, the Court found that the most reasonable, equitable, and appropriate remedy would be to allow class members to compete through the Foreign Service examination mechanism for some number of Foreign Service Officer jobs at USIA that would be set aside for the most qualified members of the plaintiff class.

Defendant has asked the Court to reconsider its decision not to order "Teamster" hearings for class members who were Foreign Service applicants. As grounds, defendant asserts that the remedy created for those applicants "constitutes a classification that must pass muster under the Fifth Amendment to the Constitution" and thus may be imposed only when narrowly tailored and necessary to correct past discrimination and when no other remedy can correct the wrong. Defendant is quite wrong to suggest that the Court's remedy creates any Fifth Amendment problems.

Defendant must be reminded that this Court has found that he discriminated against the class members who will be competing for the Foreign Service slots. As such, he errs by relying on *Hammon v. Barry*, 813 F.2d 412 (D.C.Cir.1987), *reh'g denied*, 826 F.2d 73 (D.C.Cir.1987), *reh'g en banc granted*, 833 F.2d 367 (D.C.Cir.1987); *grant of reh'g en banc vacated*, 841 F.2d 426 (D.C.Cir.1988); *petition for cert. filed* (January 11, 1988).

In *Hammon*, the Court of Appeals rejected the district court's finding that there was a continuing legacy of historical discrimination. Quite in contrast to this case, in *Hammon* there was no finding that the defendant had discriminated against the particular plaintiffs. The result is that, unlike *Hammon*, in this case there is now a presumption that every member of the plaintiff class was the victim of defendant's discriminatory behavior. *See, e.g., International Bhd of Teamsters v. United States*, 431 U.S. at 372; *Hartman v. Wick*, 678 F.Supp. at 333.

This presumption is commonly borne out or challenged through individualized "Teamster" hearings. But the Court is not required to order individualized hearings for Foreign Service applicants, as it did for the rest of the plaintiff class. The law permits such hearings where appropriate, but it does not demand them in all cases. *See, e.g., Segar v. Smith*, 738 F.2d 1249, 1289-90 (D.C.Cir.1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985).

Teamster hearings would be inappropriate for the Foreign Service applicants. The undisputed information before the Court (which was provided by defendant through informal discovery) suggests that near-

ly 33,000 women took the Foreign Service Entrance Exam during the ten-year period relevant to this case. *See* Plaintiffs' Opposition to Defendant's Motion for Partial Reconsideration, at 11. If even one-tenth of these applicants are class members, the cost of the hearings alone, conservatively estimated, would near $2 million.[1] If a better alternative exists—as one does here—a court has no business imposing so outlandishly expensive a remedial scheme.

There is another reason why the individualized hearing remedies would be inappropriate for the foreign service applicants. Those applicants faced discrimination in the testing process. An individualized hearing could not remedy that discrimination; the defendant would rely on the test score to argue that the applicant was unqualified for the position, and every applicant would then be in the untenable position of convincing the Master or Magistrate of precisely where the tests were flawed and how the tests effected discrimination. These plaintiffs should have the opportunity to take a better test, not an opportunity to prove they were victimized by a discriminatory examination.

Thus, the *Teamster* process could not "ensure that those women most likely to merit appointment as Foreign Service officers achieve that goal within a reasonable time and with no more than a reasonable

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[1] Plaintiffs state, and the Court agrees, that an "extremely conservative" estimate of the preparation time for each individual case would require is eight hours. Plaintiffs' Opposition to Defendant's Motion for Partial Reconsideration, at 13 n. 5. Even if attorney's fees were limited to $75/hour, the cost of the hearings, aside from the cost of the Master or Magistrate's time, would near $2 million.

cost and burden upon defendant." *Hartman v. Wick*, 678 F.Supp. at 339. Because the *Teamster* remedy would be both ineffective and prohibitively costly, the Court imposed a different remedy, and it was proper to do so.

The Court imposed a careful and narrow remedy that offers the only practicable remedy for discrimination against class members who applied for positions as Foreign Service officers.[2] This remedial order fully complies with constitutional command. *See, e.g., Segar v. Smith*, 738 F.2d 1254, 1249, 1293-94 (D.C.Cir.1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985). As a result, the Court will not reconsider the remedy it made available to class members who were Foreign Service Applicants.

CONCLUSION

Defendant moved to reconsider two issues decided by the Court's January 16, 1988, Opinion. The first, whether plaintiffs must prove their minimum quali-

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[2] Specifically, the Court ordered defendant to invite class members with the highest written scores on the Foreign Service written examination to participate again in the rest of the Foreign Service testing process. Those who choose to do so will compete in the next stage of that process, the "Oral Assessment" stage, and will be evaluated alongside all other Foreign Service candidates. Class members who succeed in that process will then face the medical and security checks through which all Foreign Service applicants must go. Those class members who succeed up through this stage will then be evaluated by the "Final Review Panel" but will be compared only to other class members. The top scorers will be offered Foreign Service positions. The Court did not have enough information to determine the precise number of these positions and it asked for additional briefing on this point. *Hartman v. Wick*, 678 F.Supp. at 340.

fication for the jobs at issue, is a question of law and it is clear: defendant cannot put this burden on plaintiffs' shoulders. The second issue, the propriety of the remedial order with respect to Foreign Service applicants, raises questions of law and equity that the Court resolved properly and sensibly in its January 16, 1988, Opinion. As there is no merit to defendant's motion, the Court will deny it.

The Court will issue an Order, of even date herewith, memorializing these findings.

ORDER

In accordance with the Opinion in the above-captioned case, and for the reasons set forth therein, it is this 15th day of April, 1988,

ORDERED that defendant's motion for partial reconsideration of the Court's January 16, 1988, Opinion and Order shall be, and hereby is, denied.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 77-2019 (CRR)

CAROLEE BRADY HARTMAN, ET AL., PLAINTIFFS

v.

BRUCE S. GELB, DEFENDANT

[Filed: July 9, 1992]

MEMORANDUM OPINION AND ORDER
OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

CHARLES R. RICHEY, District Judge.

By Order of May 7, 1992, this Court referred to Special Master Stephen A. Saltzburg discrete issues regarding the implementation of a remedy in the above-captioned case. *See Hartman v. Gelb*, Civ. 77-2019 (D.D.C., May 7, 1992). After considering further briefing and argument, the Special Master outlined his recommendations to the Court. *See* Report and Recommendation of the Special Master Regarding Foreign Service Officers, filed June 8, 1992 (hereinafter, "Master's Report"). The Special Master has made the following suggestions: (1) that those women who registered for the December 1984 examination are eligible to participate in the re-evaluation for foreign service officer ("FSO") posi-

tions; (2) that 52 FSO slots should be set aside for Hartman class members; (3) that the Defendant should set aside a minimum of 15 slots each year for three years, with the remainder of seven slots to be allocated in the fourth year, if necessary; (4) that a ratio of 8:1 should be used to determine how many class members will be invited to compete for each available FSO slot;[1] (5) that late claims be allowed until the time that the rank-order listing is prepared, and then late claims be permitted upon a showing of good cause; (6) rank-ordering should be based upon the USIA cones of the foreign service entrance examination, and that the USIA is free to consider the overall test score in making job offers; and (7) certain additional information should be provided in the notice to the class members.[2]

The parties were afforded an opportunity to file any opposition to the Master's Report for the Court's consideration. *See* Order, *Hartman v. Gelb*, *supra* (D.D.C., June 18, 1992). Upon consideration of the Master's Report, the parties' objections thereto, the record herein and the applicable law, the Court shall adopt the Master's Report in part. However, the Court shall not adopt the Special Master's recommendations with respect to the ability of December 1984 testtakers to participate in the class relief and

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[1] However, the Master also recommends that this ratio be adjusted should circumstances warrant.

[2] The Special Master recommended expediting the time within which parties may file any objections to the Master's Report with the Court. The Court accepted this recommendation in part, allowing a slight extension of time at the Defendant's request without objection from the Plaintiffs. *See* Order, *Hartman v. Gelb*, *supra* (D.D.C., Jun. 18, 1992).

the number of slots to be reserved for class members who applied for FSO positions at the United States Information Agency ("USIA") during the 1978 to 1984 period. For the reasons stated herein, the Court finds that the Defendant shall reserve 39 foreign service officer positions in the USIA for these class members over the next three (3) years.

1. Recommendations of the Special Master to which the Parties Have Not Objected.

The parties have not objected to three of the Master's recommendations. Specifically, the parties do not oppose the Master's recommendation with respect to late claims and have not objected to the Master's suggestion that eight (8) class members should be invited to compete for each FSO slot set-aside by the Court for the class. Moreover, the parties do not object to the Master's proposal to include certain additional information in the notice to be mailed to the class members. See Master's Report at 22-23. The Court also agrees with the Master's analysis of these points. Accordingly, the Special Master's recommendations with respect to the 8:1 ratio of invitees to available FSO slots, the filing of late claims and the inclusion of additional material in the notice to the class shall be adopted by the Court.

2. The Ability of the December 1984 Examinees to Participate in the FSO Reevaluation Process.

Prior to deciding the appropriate number of FSO slots to be reserved for the Hartman class, the Court must resolve the dispute as to whether the class includes those women who took only the December 1984 foreign service officer examination and who did not obtain FSO employment at the USIA thereafter.

According to this Court's 1988 Opinion and Order in the above-captioned case, the plaintiff FSO class consists of those women who "unsuccessfully applied" for FSO positions between October 8, 1974 and November 16, 1984. *See Hartman v. Wick*, 678 F.Supp. 312, 338 (D.D.C.1988). The Defendant contends that those women who took the December 1984 examination are not included in the class due to the November 16, 1984 closing date for the class. *Id.* at 328. Upon closer evaluation of the record, the Court must conclude that the Defendant is correct.

The instant confusion over the membership of the class revolves around what constituted an "application" for FSO employment at the USIA during the relevant time period. As the Plaintiffs point out, the initial step in applying for an FSO position required one to register to take the foreign service examination. *See, e.g.*, Plaintiffs' Memorandum on the Issue of Whether the 1984 Entry Level Foreign Service Officer Applicants Are Members of the Class, filed June 12, 1992, at 2-5 (citing, Pl.Ex. 208 at 8-9, 13). Thus, in order to take the December 1984 examination, an applicant must have completed this registration process on or before October 19, 1984—well before the November 16, 1984 cutoff date for participation in this class action lawsuit. *Id.* (citing, Nov. 28, 1984 letter to Mr. H. Carter, Attachment A). Contrary to the Plaintiffs' claim, however, registration does not complete the application process. Rather, in order to be considered for an FSO position, a candidate must have completed the foreign service examination. *See Hartman*, 678 F.Supp. at 339, n. 18. *See also* Pl.Ex. 208 (which treats the examination as an integral part of the examination process). Those

class members with examination scores above a given baseline were then obligated to proceed to the oral assessment panels as well as to the medical and security reviews. *Hartman*, 678 F.Supp. at 339, n. 18.

The Court's discussion of the Palmer reevaluation process elucidates what constitutes an "unsuccessful applicant" for purposes of the FSO group of *Hartman* Plaintiffs. Although the Court found that discrimination permeated the entire hiring process, the peculiarities of the FSO hiring process led the Court to adopt the Palmer-style of reevaluation for the Plaintiff FSO candidates. In adopting the Palmer reevaluation scheme, the Court contemplated that the class members participating in the remedial process for FSOs would have at least completed the foreign service examination. *See Id.* at 339 (list of eligible candidates must include "the names, addresses and scores of women who applied to the Foreign Service Officer at USIA or, for the years in which all foreign service applicants took one joint examination, a rank-order list of women who failed the USIA "cones" on the Foreign Service exam") (emphasis added).[3]

Defining an "unsuccessful applicant" in the FSO process based upon whether the applicant registered and took the examination makes sense. Almost by

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[3] The Court did not fashion relief only for those applicants who survived every stage of the hiring process. Rather, the Court determined that any woman who took the examination qualified as an "applicant". Moreover, the Court did not require that FSO candidate class members have completed every stage of the hiring process because some female candidates may have been excluded from further consideration in the FSO hiring process as a result of the discriminatory impact of the examinations themselves.

definition, the USIA could not reevaluate a female candidate under this Court's Palmer rubric if she does not have a test score for ranking purposes; the Palmer method does not provide for the administration of tests to those who merely filled out the registration card. Moreover, defining an "unsuccessful applicant" as one who registered for and completed the foreign service examination comports with the Court's findings regarding the extent of the Defendant's liability. Absent evidence detailing a pattern of discrimination beyond November 16, 1984, the Court presumed that the Defendant would properly implement this Court's Orders and therefore denied prospective relief to the Plaintiffs. *See Hartman*, 678 F.Supp. at 340-341. Given the denial of prospective relief, it would make no sense to include the December 1984 testtakers in the Plaintiff class; the timetable of the evaluation process[4] would have insured that the December 1984 examinees would presumptively benefit from the Defendant's ability to "learn from its mistakes" in processing women's applications highlighted in the Court's November 16, 1984 Opinion and Order. *See Id.* at 340 (*citing, inter*

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[4] These prospective Plaintiffs obviously would not have known of their test scores on or before November 16, 1984, and therefore would not have been considered during the period when the agency was proven to be discriminating in hiring on the basis of gender. Moreover, because candidates who pass the examination remain under consideration for approximately 18 months after their testing date, *see* Tr. of June 2, 1992 Hearing before the Special Master, at 24, allowing the December 1984 testtakers to participate in the class relief would extend the Defendant's liability beyond the November 16, 1984 date on which the Defendant's liability ceased as a matter of law.

alia, Local 28, Sheet Metal Workers Int'l Ass'n v. E.E.O.C., 478 U.S. 421 (1986)).

3. The Appropriate Number of FSO Positions to be Reserved for Members of the Hartman Class

Extrapolating on the basis of data provided by Dr. Siskin in the Court's 1987 remedial hearing and data regarding the USIA's recent FSO hiring patterns, the Special Master has recommended that 52 FSO slots be reserved for the *Hartman* class over a four-year period. The Plaintiffs object to the Master's recommendation. Plaintiffs claim that the appropriate figure is either 216 slots over a number of years, the full extent of shortfall identified by Dr. Rosenblum in the 1984 liability hearing, or, alternatively, 75 slots, representing a composite of the 216 figure based upon reserving 50 percent of the USIA's FSO positions for class members over a three-year period. The Defendant, on the other hand, contends that Dr. Siskin's data reveals the appropriate number of FSO set-asides to be zero (0). Alternatively, Defendant claims that the Court should plug in the Defendant's most recent hiring statistics[5] into Dr. Siskin's formula and should limit to number of available slots to 41.

Upon carefully evaluating the record herein, the Court must conclude that the appropriate number of FSO slots is 39. First, contrary to the Plaintiffs' claim, Dr. Rosenblum's finding of a shortfall of 216

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[5] The Defendant's statistics are referred to as Exhibit 2 in the Master's Report. The Master's calculations based upon a composite of the Siskin data and the Defendant's data are attached to the Master's Report at Exhibit 3.

foreign information specialists[6] does not directly translate into the number of FSO slots to be reserved for the Hartman class. Dr. Rosenblum's data dramatized the existence of a pattern and practice of discrimination in hiring at the USIA. The Court repeatedly emphasized that the Rosenblum data established a prima facie case of discrimination, which the Defendant could rebut through its own evidence. *See Hartman*, 600 F.Supp. at 370-372. The Rosenblum data did not purport to show the degree of relief to which Plaintiffs would be entitled, nor could it do so as the parties agreed to bifurcate the Court's consideration of liability and remedy. In fact, the Court noted at the conclusion of its 1988 Opinion on remedies that the exact number of slots to be set-aside for the Hartman class would depend upon the actual hiring patterns at USIA and on the USIA's ability to absorb the new hires. *See Hartman*, 678 F.Supp. at 340 (deferring consideration of Plaintiffs' request for 75 appointments from the special register because the Court "does not know how many Foreign Service Officers are appointed each year or whether the agency would argue, and be able to show, that twenty-five appointments per year would be inappropriate").

As the Master explained, Dr. Rosenblum's statistical data examined USIA's hiring practices at a particular point in time, *i.e.*, as of 1978. *See Id.* at 374 (noting that, although Rosenblum "analyzed the Agency's workforce at a specific point in time," the Defendant's data did not rebut Plaintiffs' prima facie

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[6] In its 1984 liability Opinion, the Court depicted Dr. Rosenblum's calculations in chart form. *See Hartman v. Wick*, 600 F.Supp. 361, 370 (D.D.C.1984).

case). While Dr. Rosenblum's data established a pattern and practice of discrimination for the reasons articulated in the Court's 1984 Opinion, it is not a sufficient basis, standing alone, for the Court to determine the appropriate remedy for the applicants for FSO positions during the 1978-1984 period.[7] Instead, the Court must attempt to make whole the class members who are victims of discrimination without creating a windfall for the class members at the expense of the employer. *See, e.g., Local 28, Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421 (1986). Absent an agreement between the parties as to the number of slots to be reserved for the *Hartman* class,[8] the Court can complete this task only by

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[7] Although the Plaintiff class includes women applicants for FSO positions during the entire 1974-1984 period, only those women who applied during the 1978-1984 period are entitled to participate in the Palmer-type of reassessment process. *See* Order, *Hartman v. Gelb, supra*, (D.D.C., Oct. 5, 1988). Those class members who applied for FSO positions during the 1974-1977 period may participate in the *Teamster* hearings. *Id.* Because the 1974-1977 applicants will be made whole through the *Teamster* process, to which the Plaintiffs agreed, the Court must reject the Plaintiffs' claim that evaluating the discriminatory hiring shortfall only for the 1978-1984 period unfairly prejudices them. Even if the FSO class had not been dissected into two parts as a result of the Defendant's recordkeeping snafu, under the Supreme Court's decision in *Wygant v. Jackson Bd. of Ed.*, 478 U.S. 267 (1986) and its progeny, the Court still would have been obliged to link the number of reserved FSO positions to the actual injury to be remedied.

[8] The Court in *Palmer* did not have to determine the number of slots to be set aside because the parties agreed to reserve 75 slots for the *Palmer* class. *See Hartman*, 678 F.Supp. at 322, n. 6. The Court hoped that the parties in this case could similarly reach an agreement on the number of FSO positions to be reserved. Although the parties did participate

examining the hiring patterns of the Defendant for the 1978-1984 period in order to determine the number of FSO hiring decisions that were likely to have been affected by the pattern and practice of discrimination.[9] *See, e.g., Berger v. Iron Workers Reinforced Rodmen, Local 201*, 843 F.2d 1395, 1438 (D.C.Cir. 1988), *clarified on reh'g*, 852 F.2d 619 (D.C.Cir.1988), *cert. denied sub nom.*, 490 U.S. 1105 (1989) (district court must craft Title VII relief to fit the exact nature of the violation); *Hammon v. Barry*, 813 F.2d 412, 425 (D.C.Cir.1987), *cert. denied sub nom.*, 486 U.S. 1036 (1988) ("the remedy tailored to address a violation must be tailored to fit that violation") (*citing, Wygant v. Jackson Bd. of Ed.*, 106 S.Ct. at 1846); *Thompson v. Sawyer*, 678 F.2d 257, 294-295 (D.C.Cir.1982).

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in the Court's mediation program, this process apparently did not succeed in removing the roadblocks to compromise on this issue.

[9] Contrary to the Plaintiffs' claim, this remedial procedure does not unravel the Court's 1984 liability Opinion and does not support the conclusions of Defendant's witness, Dr. Wolfbein. As Plaintiffs will recall, Dr. Wolfbein attempted to rebut the Plaintiffs' *prima facie* case of discrimination by showing that, during the 1973-1978 period, the agency hired more women than were available in the relevant labor market at that time. *See Hartman*, 600 F.Supp. at 372-374. The Court rejected Dr. Wolfbein's conclusion that there was no discrimination because, *inter alia*, his categorical samples were unreasonably small. *Id.* at 373. Nothing in the instant Memorandum Opinion alters the Court's finding on this point, and Dr. Rosenblum's findings on the pattern and practice of discrimination in hiring stand. In short, Dr. Wolfbein's data are irrelevant to the Court's determination regarding compensation for the victims of this class-wide discrimination.

In determining the appropriate number of reserved FSO positions, the Court must first decide whether to rely upon Dr. Siskin's data, the Defendant's more recent hiring data, or some combination thereof. After careful consideration, the Court must conclude that the best alternative is to rely on Dr. Siskin's model which was presented at the 1987 Hearing on remedies. *See* Ex. 1, attached to Special Master's Report. The Special Master's decision to exclude the Defendant's recent hiring data is entirely correct. The Defendant did not present this information in the 1987 Hearing on remedies and Plaintiffs were never afforded an opportunity for cross-examination. More importantly, the Court cannot countenance the Defendant's attempt to undermine Dr. Siskin's testimony at this late stage. Although, as a general matter, more recent evidence is preferable to outdated material, the Defendant alone was in possession of the hiring statistics at USIA. The Plaintiffs' witness should not be subject to impeachment in absentia merely because the Defendant now has more recent hiring statistics at its disposal. Specifically, the Defendant's attempt to cross-examine Dr. Siskin by discrediting the sample size and the actual hiring shortfall on the basis of the recently-available hiring data is belated and unfair.

According to the Defendant, Dr. Siskin's testimony self-destructs. Defendant argues that Dr. Siskin's comparison of the agency's hiring to the available census data for "writers and artists not elsewhere classified" and "technical writers" reveals that the FSO Plaintiffs are not entitled to any reserved positions pursuant to the Court's 1988 Order. There does not appear to be any dispute that, under these

two categories identified by the Defendant, there is no statistically significant shortfall during the relevant time period. However, it is also undisputed that when Dr. Siskin employed the census category of "editors and reporters", the cross-mapping technique yielded a statistically significant hiring shortfall of 39 FSO positions during the 1978-1984 time period. *See* Ex. 1, attached to Master's Report. The Defendant claims that the Court is precluded from considering the "editors and reporters" matrix because this is precisely the same matrix which the Court rejected in its evaluation of Dr. Wolfbein's testimony at the liability stage.

Albeit creative, the Defendant's argument fails. Although the Defendant has qualms about the Court's reliance upon the "editors and reporters" category for cross-mapping purposes, the Defendant's claim of unfairness is wholly unpersuasive. Defendant's own expert, Dr. Wolfbein, used this precise category for cross-mapping in the liability phase. Moreover, the Defendant did not challenge Dr. Siskin's use of this category at the 1987 Hearing on remedies. Furthermore, contrary to the Defendant's claims, this Court did not find that the "editors and reporters" category was an inappropriate basis for examining the USIA's hiring shortfall. Instead, the Court twice adverted to the fact that Dr. Wolfbein's use of this category actually enhanced the magnitude of the hiring shortfall for female FSOs. *See Hartman*, 600 F.Supp. at 371-72, n. 4; *id.* at 374. The Court did not opine on which categories were more appropriate for cross-mapping purposes and held only that Dr. Rosenblum selected reasonable categories for his cross-mapping analysis. *Id.* at 372. Thus, the Plaintiffs were not

precluded from using a more favorable analysis of the hiring shortfall at the remedial stage of the proceedings, especially when the analysis spotlights a hiring disparity which was introduced at the liability stage according to the Defendant's own evidence.

Because the Court finds that the December 1984 examinees are not class members and are therefore not eligible to participate in the FSO reevaluation process, the Court disagrees with the Special Master's attempts in fashioning a remedy for the testtakers in December of 1984. *See* discussion, *supra*, at 3-6. Thus, the Court shall not add an additional 13 slots to the number in Dr. Siskin's data to account for the shortfall in 1986 FSO hiring. The appropriate number of slots to be reserved for the *Hartman* class members who applied for FSO positions during the 1978-1984 period is therefore 39. The Court finds that filling these 39 positions over a three-year period would remedy the discrimination in hiring with the greatest alacrity possible without placing an undue burden on the Defendant. Moreover, the Court finds that, in order accommodate the Plaintiffs' concern that class members do not overwhelm any entering FSO class,[10] the Court shall order the Defendant to hire at least 13 class members in each entering FSO class for the next three years. This number is reasonable given the Defendant's own estimate that the number of entering FSOs in the USIA's recent classes hovers around 30. *See, e.g.*, Defendant's Memorandum in Support of His Objec-

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[10] *See* Plaintiffs' Memorandum of Points and Authorities Regarding Relief for Female Applicants to Foreign Service Officer/Foreign Service Information Officer Positions, filed June 20, 1991, at 8-9.

tions to the Special Master's Recommendations Regarding Relief for Foreign Service Class Members, filed June 18, 1992, at 12, n. 7.

4. Whether the Rank-Ordered List Should be Formulated on the Basis of the Score on the USIA Cones of the Foreign Service Examination.

In October of 1991, counsel for the parties jointly devised a Notice to the Class which provided as follows:

> In compliance with this Court's Order, the USIA has compiled a rank order list, by score for each year for the years 1978-1979, of unsuccessful female applicants for entry-level positions in the Foreign Service with the Agency. For the years 1980-1984, when USIA participated in the Foreign Service Entrance Examination along with the Department of State and other federal agencies, these rank order lists were compiled from the scores of the USIA's Information/Culture "cone" or subtest on the examination.

Class Notice to Female Applicants to Entry Level Foreign Service Information Officer/ Entry Level Foreign Service Information Officer Positions with the United States Information Agency from January 1, 1978 to November 16, 1984, at 2, attached to Praecipe, *Hartman v. Gelb*, *supra*, filed October 2, 1991. Despite the fact that the Notice advised class members that the rank-ordering would depend upon the score on the USIA cones of the examination, the Defendant now claims that the rank-order list of candidates should be determined according to the score on the entire foreign service examination. For the reasons stated herein, and for the reasons

articulated by the Plaintiffs and the Special Master, the Court shall reject the Defendant's claim.

The Defendant's request to alter the rank-ordering procedure at this late stage must be denied for several reasons. As the Plaintiffs point out, altering the rank-ordering procedure—to which the Defendant himself agreed—at this late stage would only add another obstacle to the participation of female applicants. *See* Plaintiffs' Memorandum of Points and Authorities on the Issue of the Appropriate Ranking Process for Entry Level Foreign Service Applicants from 1978 Through 1984, filed June 12, 1992, at 4-5. Moreover, using the scores on the USIA cones of the examination for purposes of developing the rank-ordered list tracks the Court's 1988 Opinion, *see* 678 F.Supp. at 339, and also logically follows from the Court's refusal to adopt the Plaintiffs' proposed composite formula. *See* Plaintiffs' Memorandum on the Issue of the Appropriate Ranking Process, *supra*, at 1-2.

Adopting the Special Master's recommendation would not disrupt the Defendant's hiring process. Under the Special Master's proposal, to which Plaintiffs do not object, the Defendant is free to consider a candidate's overall score in deciding which candidates are the best qualified for the 39 reserved FSO positions. In this way, the Defendant will not be forced to hire "sub-standard" candidates and will, in fact, be offered a wider array of candidates from which to choose. The Court shall adopt the Special Master's recommendation with respect to the preparation of

the rank-ordered lists and with respect to the role of the overall test scores in the hiring process.[11]

For all of these reasons, the Court shall adopt the Special Master's recommendations with respect to the notice to be provided to class members, the 8:1 ratio of invitees to reserved positions, the filing of late claims, and the procedure for developing the rank-ordered list of FSO candidates. However, for the reasons stated herein, the Court finds that the December 1984 examinees are not "unsuccessful applicants" within the definition of the Plaintiff class and therefore these women may not participate in the FSO reevaluation process. The Court also finds that the USIA shall reserve 39 FSO positions for members of the Plaintiff class and shall award 13 such positions each year, for the next three (3) years, to the most qualified candidates among the Plaintiff class. The Court shall issue an Order of even date herewith in accordance with the foregoing Memorandum Opinion.

ORDER

Upon consideration of the Special Master's Report, the parties' objections thereto, the applicable law and the record herein, and for the reasons articulated in the Court's Memorandum Opinion of even date herewith, it is, by this Court, this 9th day of July, 1992,

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[11] The ability of the Defendant to consider a candidate's overall score in the foreign service entrance examination in making an employment decision should be addressed in the notice to the class members.

ORDERED that the Special Master's Report and Recommendation shall be, and hereby is, adopted in part and rejected in part; and it is

FURTHER ORDERED - that the Defendant's Motion to Exclude those women who took only the December 1984 foreign service examination from the pool of candidates eligible to participate in the foreign service officer Palmer reevaluation process shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Plaintiffs' Motion to Reserve either 216 or, alternatively, 75 foreign service officer positions for the class shall be, and hereby is, DENIED; and that the Defendant's Motion to Reserve zero foreign service officer positions shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that, for the reasons articulated in the Court's Memorandum Opinion of even date herewith, the Defendant shall reserve a total of 39 foreign service officer positions for the members of the Plaintiff class, and that the Defendant shall fill at least 13 of these positions each year for three (3) years; and it is

FURTHER ORDERED that, without objection of the parties, the Special Master's Recommendation as to the 8:1 ratio for inviting class members to compete in the reevaluation process shall be, and hereby is, ADOPTED, and that, based upon this 8:1 ratio, a total of 312 members of the Plaintiff class shall be invited to compete for the 39 foreign service officer positions to be reserved by the Defendant; and it is

FURTHER ORDERED that, without objection of the parties, the Special Master's Recommendation with respect to the filing of late claims shall be, and

hereby is, ADOPTED, and that, all claims shall be accepted for review until the time when the rank-ordered list is completed, and that, after the rank-ordered list is completed, any late-filed claim may be considered only if the late claimant can demonstrate good cause for failing to meet the deadline; and it is

FURTHER ORDERED that, without objection of the parties, the Special Master's recommendation as to the need to provide further information to the Plaintiff class shall be, and hereby is, ADOPTED, and that the parties shall devise a completed notice in accordance with the recommendations articulated at pages 22-23 of the Special Master's June 8, 1992 Report; and it is

FURTHER ORDERED that the Special Master's Recommendation with respect to the procedure for determining the rank-ordering shall be, and hereby is, ADOPTED, and that the Defendant shall prepare a rank-ordered list of the candidates based upon their scores on the USIA cones of the foreign service entrance examination; and that the Defendant is free to consider each candidate's overall score on the examination in determining which Plaintiffs are the most qualified to fill the 39 reserved positions; and it is

FURTHER ORDERED that, consistent with this Court's May 7, 1992 Order, the parties shall mail invitations to participate in the FSO reevaluation process to the appropriate class members on or before 4:00 p.m. on July 15, 1992.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 92-5347, 92-5325.

CAROLEE BRADY HARTMAN; ALL OTHER PLAINTIFFS, APPROX. 50 ADDITIONAL PLAINTIFFS, PLAINTIFFS-APPELLANTS

v.

JOSEPH DUFFEY, DIRECTOR, UNITED STATES INFORMATION AGENCY; ALL OTHER DEFENDANTS, ONE ADDITIONAL DEFENDANT, DEFENDANTS-APPELLEES

CAROLEE BRADY HARTMAN; ALL OTHER PLAINTIFFS, APPROX. 50 ADDITIONAL PLAINTIFFS, PLAINTIFFS-APPELLEES

v.

JOSEPH DUFFEY, DIRECTOR, UNITED STATES INFORMATION AGENCY; ALL OTHER DEFENDANTS, ONE ADDITIONAL DEFENDANT, DEFENDANTS-APPELLEES

[Filed: Apr. 5, 1994]

Before: WALD, HENDERSON, and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

Separate concurring opinion as to Part II-B. filed by Circuit Judge RANDOLPH with whom Circuit Judge HENDERSON concurs.*

WALD, Circuit Judge:

This is an interlocutory appeal from an order of the district court in a gender discrimination class action initiated in 1978 on behalf of women who unsuccessfully applied for civil service and foreign service positions at the United States Information Agency ("USIA" or "Agency"). In that order, the district court required the Agency to set aside thirty-nine foreign service positions for remedial allocation to women who had applied for foreign service officer positions at the USIA during the liability period but were ultimately denied employment. *Hartman v. Gelb*,[1] No. 77-2019 (D.D.C. July 9, 1992) *reprinted in* Joint Appendix ("J.A.") at 337. After fifteen years of proceedings including a finding of liability entered against the USIA in 1984, *Hartman v. Wick*, 600 F.Supp. 361 (D.D.C.1984), an order establishing the remedial framework in 1988, *Hartman v. Wick*, 678

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* Judge Randolph's opinion represents the reasoning of a majority of the panel as to the issue discussed in Part II-B.

[1] Pursuant to Rule 43(c)(1) of the Federal Rules of Appellate Procedure, "[w]hen a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency . . . ceases to hold office, . . . the public officer's successor is automatically substituted as a party." Since commencement of this suit in 1977 the helm of the United States Information Agency has been passed from John E. Reinhardt to Charles Z. Wick to Bruce S. Gelb to Henry E. Cato and, finally, to Joseph Duffey who is the named defendant in this action.

F.Supp. 312 (D.D.C. 1988), and the Agency's resulting expenditure of over $2 million to notify potential class members of available remedies, the USIA raises in an appeal for the first time the issue of whether the class certification back in 1978 was appropriate.

Since unfortunately we are unable to decide on the record before us that this suit is properly certified as a class action, we are compelled to remand the case to the district court to make the necessary findings on and to consider possible revisions to the original class certification. Cautiously deciding at this juncture only what we have to, we resist appellant's suggestion to review the merits of the district court's 1984 liability findings. Since a modified class certification could also moot any dispute about the number of remedial foreign service slots, we do not decide that issue either.

I. BACKGROUND

In March 1977, Luba Medina, a former Agency employee, brought an individual complaint under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-2000e-17, alleging that the Agency had failed to rehire her on the basis of her gender, in retaliation for her own prior charges of gender discrimination, and because of her husband's representation of minorities in Equal Employment Opportunity Commission ("EEOC") actions.

On November 25, 1978, Carolee Brady Hartman filed this civil suit as a class action on behalf of herself and all other women "who have made applications to work for and/or are currently employed by the United States Information Agency . . . and who have been and continue to be adversely affected by the

[Agency's sexually discriminatory] employment practices." J.A. at 1, 1-2. Specifically as to herself, Ms. Hartman alleged that she had interviewed for the position of writer/editor with the USIA's *Horizon* magazine, that the male interviewer "stated that [p]laintiff was very well qualified for the position," but "stated to [p]laintiff that he was looking for a male to fill the writer/editor position," and that after plaintiff's rejection the position remained open and the USIA continued to seek applicants. J.A. at 4.

In February 1978, Ms. Hartman moved for class certification pursuant to Rule 23(b)(2) & (c)(1) of the Federal Rules of Civil Procedure, J.A. at 20, and in April, 1978, the district court conditionally certified the class of "all women who have applied for employment with or are currently employed by the [USIA] and who have been or continue to be adversely affected by the [USIA's] discriminatory employment practices," J.A. at 48.

In late April, 1978, Toura Kem brought an individual Title VII action against the USIA alleging that she had been denied a permanent Agency position on account of her gender. Later that year, the district court permitted Ms. Medina and two Agency employees, Josefina Martinez and Rose Kobylinski, to intervene in the class action as named plaintiffs and finally consolidated the three actions of Ms. Hartman, Ms. Kem, and Ms. Medina. J.A. at 49, 53, 54.

The parties agreed to bifurcate the trial of the class claims into a liability and remedy stage. *Cf. International Bhd. of Teamsters v. United States*, 431 U.S. 324, 360-61, 97 S.Ct. 1843, 1867-68, 52 L.Ed.2d 396 (1977) (describing such bifurcation of trial). After a bench trial on the class liability issues, the district court modified the class to exclude women in clerical

positions and entered a judgment for defendant on all counts because plaintiffs had failed to establish a *prima facie* case of gender discrimination. *De Medina v. Reinhardt*, 444 F.Supp. 573, 21 Fair Empl.Prac.Cas. (BNA) 75 (D.D.C.1978). After three of the named plaintiffs voluntarily dismissed their claims and after conducting a trial on the individual claims of Ms. Kobylinski and Ms. Medina, the district court further dismissed Ms. Medina's claim on the merits and Ms. Kobylinski's claim because she had failed to exhaust her administrative remedies. *De Medina*, Nos. 77-0360, 77-2019 & 78-0762 (D.D.C. June 15, 1981).

On appeal in 1982, we upheld the district court's rejection of the class promotion discrimination claim and reversed the dismissal of the class hiring discrimination claim because the district court's opinion "reflect[ed] a basic misperception of the relevancy and role of statistical evidence in the plaintiffs' *prima facie* showing." *De Medina*, 686 F.2d 997 (D.C.Cir. 1982). In addition to ordering the reconsideration of the class hiring claim, we instructed the trial judge on remand to make specific findings on the class retaliation claim. *Id.* at 1011-12. We reversed the dismissal of Ms. Kobylinski's individual claim and affirmed the rejection of Ms. Medina's. *Id.* at 1012-15.

By stipulation of the parties, the trial court on remand reconsidered the case without further development of the record. Although denying the class retaliation claim, the court found, after reconsidering its earlier dismissal of the statistical evidence, that the Agency had discriminated against women in hiring for six occupation categories. *Hartman v. Wick*, 600 F.Supp. 361 (D.D.C. 1984). The court also

entered judgment in favor of Ms. Kobylinski's individual claim.

In 1988, the district court in a detailed opinion ruled on the framework for the relief to be afforded the plaintiff class. *Hartman v. Wick*, 678 F.Supp. 312 (D.D.C. 1988). Unless the parties agreed on a different procedure, class members who had applied for a *civil service* position at the USIA would be given individualized *Teamster* hearings to assess appropriate relief. *Id.* at 333 (citing *Teamsters*, 431 U.S. at 372, 97 S.Ct. at 1873).[2] A class member who prevailed at her *Teamsters* hearing would be entitled to "full make-whole relief under Title VII," including back pay and appropriate reinstatement or front pay. *Id.* at 335-37.

In the case of *foreign service* officer hires at the Agency, the court further ruled that class members who had applied for foreign service jobs at the USIA would be permitted to compete for a designated number of such positions to be specially set aside by the Agency for class relief purposes. *Id.* at 338-40. The court ordered the USIA to prepare a rank-ordered list of the women who had unsuccessfully

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[2] At each *Teamsters* hearing the plaintiff must show by the preponderance of the evidence that she applied for a job in one of the categories during the liability period and was rejected. She is then entitled to a presumption that the employer discriminated against her on the basis of her gender. The employer is then given an opportunity to overcome that presumption by demonstrating that he had a legitimate, nondiscriminatory reason for rejecting the applicant. If the defendant meets this burden, the claimant is allowed to offer further evidence demonstrating that the employer's proffered reason is merely a pretext for unlawful discrimination. *See Hartman v. Wick*, 678 F.Supp. at 335.

applied for foreign service officer positions during the period of liability. However, the court postponed decision on the final number of such reserved slots pending further briefing. On the basis of the liability finding in 1984, the court required the Agency to bear the costs of notifying potential class members about the relief. Finally, the court denied plaintiffs' request for any further prospective relief. *Id.* at 340-41.

Since 1988, more than 30,000 women have been contacted and more than 10,000 women are currently participating in the relief process, at a cost to the defendant of roughly $2 million. Reply Brief for Appellees at 19 n. 8 & 20 n. 9.

In July 1992, the court ordered the Agency to set aside thirty-nine foreign service positions over the next three years for women on the rank-ordered list of unsuccessful foreign service applicants. *Hartman v. Gelb*, No. 77-2019 (July 9, 1992), *reprinted in* J.A. at 337. It is this last order from which the Agency now appeals challenging not only the number of remedial foreign service positions, but, more basically, the district court's 1984 liability determination and the original 1978 class certification. Plaintiffs cross-appealed, arguing that a greater number of remedial foreign service positions was required as well as other types of prospective relief denied by the district court in 1988.

II. ANALYSIS

A. *Jurisdiction*

The Agency appeals from the 1992 order pursuant to 28 U.S.C. § 1292(a) which provides in part:

> [T]he courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . .

As the Supreme Court noted in *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978), this "exception from the long-established policy against piecemeal appeals . . . is a narrow one and is keyed to the 'need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.'" *Id.* at 480, 98 S.Ct. at 2453 (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181, 75 S.Ct. 249, 252, 99 L.Ed. 233 (1955)). "The exception does not embrace orders that have no direct or irreparable impact on the merits of the controversy." *Id.* at 482, 75 S.Ct. at 253.

In this case, the trial court's 1988 order laid down the basic framework of relief for both the civil service and the foreign service subgroups of the class, reserving for future decision only the exact number of foreign service officer positions to be set aside. Accordingly, the appellee class members maintain that the 1992 order decided only an ancillary issue to the 1988 relief order, and since the Agency never appealed the 1988 order, it may not belatedly challenge anything in it in the context of this appeal. Either the review of the number of slots should be postponed to the end of the entire litigation or this appeal should decide only that narrow question. The question is close, but on balance, we disagree with such a restriction.

Whether or not the 1988 remedial decision would have qualified in its own right as an appealable injunction under § 1292(a)(1) (because it ordered the USIA to bear the costs of notifying class members and compile a rank-ordered list of unsuccessful foreign service applicants), the 1992 order cannot be dismissed as mere litigation housekeeping. The 1992 order affirmatively required the Agency to set aside thirty-nine foreign service positions and to fill thirteen of these positions for each of the next three years with plaintiff class members. Thus, it provided a portion of the substantive relief sought by plaintiffs in this suit, and its effect was to enjoin partially the USIA's usual hiring policies. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981) (holding court's refusal to enter a consent decree subject to interlocutory appeal because, *inter alia*, petitioners had "sought an immediate restructuring of respondents' transfer and promotional policies" and asserted irreparable injury caused by any delay). Indeed, the first thirteen entry-level foreign service officers have already been hired and are currently in training with the USIA. Brief for Appellees at 42. The imposition of this special hiring requirement clearly qualifies the 1992 order as an injunction appealable at this time so that the USIA can "effectually challenge" the order's direct and, arguably, irreparable impact.

As we reiterated in *Wagner v. Taylor*, 836 F.2d 578 (D.C.Cir. 1987), once jurisdiction is properly invoked under § 1292(a)(1):

> "[r]eview quite properly extends to all matters inextricably bound up with the remedial decision. . . . [T]he scope of review may extend

> further to allow disposition of all matters appropriately raised by the record, including entry of final judgment. Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development."

Id. at 585 (quoting 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3921 p. 17 (1977)). *Accord Energy Action Educ. Found. v. Andrus*, 654 F.2d 735, 745 n. 54 (D.C.Cir.1980) (quoting same), *rev'd on other grounds sub nom. Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981). Nonetheless, cognizant of the danger of wide net-casting, we have also repeatedly cautioned that matters so reviewed must indeed be "'closely related'" to the subject of the interlocutory appeal itself. *Id.* (quoting *Energy Action Educ. Found.*, 654 F.2d at 746 n. 54).

In the instant case, we conclude that the decision to reserve thirty-nine foreign service positions for the plaintiff class is inextricably bound up with the heart and soul of this protracted litigation, and particularly with the thorny issue of class certification. Only if the scope of the trial court's class certification as well as the merits of the class hiring discrimination claim with respect to foreign service officers is sustainable, can the court's 1992 decision to allot thirty-nine remedial foreign service positions withstand attack. *See Fentron Indus., Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982). Far from contravening *Gardner*'s policy against fragmentary appeals, closure on these fund-

amental issues in the suit is necessary to provide a proper groundwork for the allocation order being appealed. At this juncture, however, we need not review the merits of the trial court's liability determination because that issue is itself inevitably bound up with the determination of the class certification. Since, unfortunately, we are not able finally to decide the class certification on this record, but must remand the case for further findings and consideration of that issue by the trial court, we must leave the liability review until the next round as well.

B. *Waiver* **

Appellees first argue that the Agency waived their challenge to class certification by failing to raise it at the appropriate time and by affirmatively stipulating later on in the proceedings that the removal of Ms. Medina as class representative did not affect the integrity of the class action.

A litigant who has sufficient opportunity to raise a challenge on an initial appeal but fails to do so, is deemed to have waived the challenge and will not be allowed to argue the issue on a later appeal. *Northwestern Indiana Tel. Co. v. Federal Communications Comm'n*, 872 F.2d 465, 470 (D.C.Cir. 1989), *cert. denied*, 493 U.S. 1035, 110 S.Ct. 757, 107 L.Ed.2d 773 (1990); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C.Cir. 1987); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071 (D.C.Cir. 1984) (per curiam), *cert. denied*, 469 U.S. 1181, 105 S.Ct. 939, 83 L.Ed.2d 951 (1985); *see also* 18 WRIGHT, *supra*, at § 4478 (1981 & Supp. 1993). An

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** Part II-B, represents the opinion of Judge Wald. Judge Randolph's concurring opinion represents the majority's reasoning on this issue.

appellate court invokes its inherent power to reconsider an issue already decided or not raised on a prior appeal reluctantly and sparingly to avoid the "bizarre result, . . . 'that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.'" *Laffey*, 740 F.2d at 1089-90 (quoting *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (per Friendly, J.), *cert. denied*, 459 U.S. 828, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982)).

Even where it is the opposing party who has lodged the direct appeal, a litigant must raise any challenge of his own to the trial proceeding by filing a cross-appeal even though he might not otherwise have chosen to appeal at that time. *See Bethea v. Levi Strauss & Co.*, 916 F.2d 453 (8th Cir. 1990) ("Bethea's failure to file a cross-appeal [challenging the trial court's denial of additional relief] estopped him from requesting further relief from the Eighth Circuit [on appeal as well as on a potential] . . . rehearing.").[3] Thus, while a litigant generally need not cross-appeal if he seeks only to sustain the lower court's decision, he will not be permitted to enlarge his rights on appeal in the absence of having filed a cross-appeal. *See generally* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 204.11 (2D ED.1993 &

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[3] One need not endorse the additional implication in the quoted passage that as a result of the litigant's failure to cross-appeal, the court of appeals "*could* not have" granted the challenge on rehearing. 916 F.2d at 456 (emphasis added). Indeed, the *Bethea* opinion itself appears to repudiate that implication. *Cf. id.* at 455 n.6. Nonetheless the failure to cross-appeal—no less than the failure to raise issues on direct appeal—creates "law of the case" that generally binds subsequent proceedings. *Id.*

Supp.1993-94); *cf.* Robert L. Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 HARV.L.REV. 763 (1974). On the other hand, where the opposing party does not take an appeal, a litigant is under no obligation to appeal at the earliest possible time during litigation. For example, a litigant may decline to take an interlocutory appeal and await final judgment to carry her contentions to the appellate court. *In re Dennis Greenman Secur. Litig.*, 829 F.2d 1539, 1542 (11th Cir. 1987); *see also* 18 WRIGHT, supra, at § 4433.

For purposes of this appeal, then, one must examine whether the Agency waived the class certification question in 1982 by failing to cross-appeal it when class members appealed from the trial court's original decision declining to find liability. The first question is whether the USIA *could have* cross-appealed the class certification issue at that time. If the Agency could not have challenged the class certification in the first appeal, it certainly cannot be deemed to have waived the issue.

"Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333, 100 S.Ct. 1166, 1171, 63 L.Ed.2d 427 (1980) (citations omitted). Consequently, although the USIA initially opposed class certification, the Agency could not have directly appealed the certification in this case because the district court's 1979 judgment on liability came out in favor of the USIA.

Cross-appeals, on the other hand, are not so limited. While some cross-appeals are simply direct appeals by

another name, *i.e.*, both parties are equally dissatisfied with the judgment, others are purely protective. In a protective cross-appeal, a party who is generally pleased with the judgment and would have otherwise declined to appeal, will cross-appeal to insure that any errors against his interests are reviewed so that if the main appeal results in modification of the judgment his grievances will be determined as well. Some protective cross-appeals are "conditional" in the sense that the cross-appeal is reached only if and when the appellate court decides to reverse or modify the main judgment.

The theory for allowing a conditional cross-appeal is that as soon as the appellate court decides to modify the trial court's judgment, that judgment may become "adverse" to the cross-appellant's interests and thus qualify as fair game for an appeal:

> A party who fully prevailed in the district court may have an equally obvious justification for cross-appeal, to protect interests that otherwise might be adversely affected by disposition of the appeal. Courts readily understand this principle, and have applied it without difficulty, permitting the cross-appeals but deciding them only if disposition of the appeal makes it appropriate.

15A WRIGHT, *supra*, at § 3902 p. 78 (2D ED.1992) (footnote omitted). *See, e.g., Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 290 (3d Cir. 1980) ("[Appellee] has filed a cross-appeal that is conditional on our reversing the judgment in its favor. Inasmuch as we have reversed the judgment in its favor, we now turn to the claim by [cross-appellant] that it is entitled to a new trial."); *Hilton v.*

Mumaw, 522 F.2d 588, 603 (9th Cir. 1975) ("An otherwise nonfinal order may become cross-appealable upon the entry of a final order. Nor does it lack cross-appealability because the final order from which the direct appeal was taken was entirely favorable to cross-appellants. The risk that they might become aggrieved upon reversal on the direct appeal is sufficient." (citations omitted)); *see also School Bd. v. Malone*, 762 F.2d 1210 (4th Cir. 1985); *American Mart Corp. v. Joseph E. Seagram & Sons, Inc.*, 824 F.2d 733 (9th Cir. 1987). In this case, the fact that the USIA was the prevailing party on the merits in the 1979 trial court decision would not have precluded it from challenging class certification on conditional cross-appeal, since if the original liability dismissal was overturned, its potential exposure to new liability on remand would be enhanced by maintaining the suit as a class action.

However, there are additional obstacles to a conditional cross-appeal of class certification. A class certification order is an interlocutory order not ordinarily appealable until entry of final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470, 98 S.Ct. 2454, 2459, 57 L.Ed.2d 351 (1978). With entry of the 1979 judgment in favor of the USIA, however, the class certification order had merged into a final judgment dismissing the action and so at first glance it would seem to be appealable as part of that final judgment.

But a second look shows that proposition not to be without doubt either. Indeed, Ninth Circuit jurisprudence

> suggest[s] a general rule that interlocutory orders regarding certification and decertifica-

> tion of class actions should not be reviewed by ... court[s of appeals] when the judgment pursuant to which appeal was taken is reversed or vacated and the case remanded. In such cases, a certification or decertification order need not be immediately reviewed, because on remand another final judgment will eventually be entered which will support review of the order.

Weil v. Investment/Indicators, Research and Management, Inc., 647 F.2d 18, 27 (9th Cir. 1981). *Accord Blake v. City of Los Angeles*, 595 F.2d 1367, 1386 (9th Cir. 1979), *cert. denied*, 446 U.S. 928, 100 S.Ct. 1865, 64 L.Ed.2d 281 (1980); *Marks v. San Francisco Real Estate Bd.*, 627 F.2d 947, 952 (9th Cir. 1980) (Kennedy, J., concurring). *Blake* involved a conditional cross-appeal of class certification much like the one the USIA might have brought back in 1982. The *Blake* appellant had won a judgment in the trial court but understandably cross-appealed to "ask th[e] court [of appeals], in the event any issue is remanded for further proceedings, to instruct the district court to re-examine the class certification order." 595 F.2d at 1385. The court of appeals declined the invitation noting that "[t]he same considerations that normally bar interlocutory review of class certification orders . . . persuade us that we should not now review the class certification order merely because the district court erroneously entered summary judgment for appellees." *Id.* at 1386 (citations omitted). The court concluded by noting that "[n]othing precludes appellees from obtaining review of the order after final judgment ultimately is entered." *Id.* (citing *Coopers & Lybrand*, 437 U.S. at 469, 98 S.Ct. at 2458).

The Seventh Circuit, on the other hand, entertained precisely the kind of cross-appeal that was turned back in *Blake*. In *Council 31, American Federation of State, County and Municipal Employees v. Ward*, 978 F.2d 373 (7th Cir. 1992), the court first reversed the trial court's decision that plaintiffs had failed to establish a *prima facie* case of employment discrimination and then decided defendant's conditional cross-appeal of class certification.

This circuit has gone different ways at different times. As noted above, *supra* section II-A., we announced in *Wagner* that "'[j]urisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development.'" 836 F.2d at 585 (quoting 16 WRIGHT, *supra*, at § 3921 p. 17 (1987)). Factually, however, *Wagner* was a far narrower holding than its rhetoric might suggest. Appellants had challenged the district court's denial of a preliminary injunction to protect the putative class "solely 'in light of' its contemporaneous denial of class certification." *Id.* at 586 (footnote omitted). Therefore, review of the class certification issue was indispensable to adjudge the validity of the denial of the preliminary injunction.

Wagner's broader language is nonetheless reflective of the law of this circuit established in other cases. In *Fink v. National Savings & Trust Co.*, 772 F.2d 951 (D.C.Cir. 1985), for example, we reviewed a denial of class certification in the course of overturning a trial court's entry of summary judgment for defendants. Without discussing jurisdiction to review the denial of class certification, and with no necessary connection between certification and the

issue decided on summary judgment, we remanded the case, *inter alia*, for reconsideration of the class certification issue. *Id.* at 960-61; *see also id.* at 964-65 (Scalia, J., concurring in part and dissenting in part) (reviewing denial of class certification but finding that denial was proper).

On the other hand, in an earlier case, we declined to entertain a conditional cross-appeal of a class certification order. *McCarthy v. Kleindienst*, 562 F.2d 1269, 1276 (D.C.Cir. 1977). In *McCarthy*, appellants had challenged the denial of a motion to intervene as well as the denial of class certification. After vacating the district court's denial of the motion to intervene, we held the "appeal of the denial of class certification [to be] essentially interlocutory with respect to [appellants'] continued participation in the lawsuit. We therefore find it inappropriate for decision at this time." 562 F.2d at 1276. *Cf. Gray Panthers v. Schweiker*, 716 F.2d 23, 39 (D.C.Cir. 1983) (refraining from deciding whether prior failure to cross-appeal class certification issue deprived district court of power under Rule 23(c)(1) to redefine the class on remand).

While the district court in the instant case had denied a preliminary injunction in 1979, it had also certified the class and entered a final judgment in favor of the defendant. *See De Medina*, 686 F.2d at 1001. Class certification was thus not necessarily bound up with the 1982 appeal which focused on the trial court's dismissal on the merits of plaintiffs' *prima facie* case. After we reversed the trial court and remanded the case, class certification, once again, became subject to modification by the trial court during proceedings on remand. Therefore, one cannot confidently say whether, upon reversing the trial

court's merits dismissal in 1982, we would have entertained a conditional cross-appeal of the class certification order at that time. While the Ninth Circuit would have counseled against such a review, the Seventh Circuit apparently would have considered the appeal. Following our precedents of *Wagner* and *Fink*, we would have examined the class certification decision, whereas *McCarthy* would have permitted us to decline the invitation.

Prescience would, of course, have commanded a course that cleared the channels to avoid running aground on this issue over a decade later. The traditional values militating against piecemeal appeals would not have been served by declining to review the class certification back at the beginning. Nonetheless, we could and might have concluded that the class certification question had reverted to interlocutory status with the reversal of the trial court's decision and the reinstatement of the hiring discrimination claim. Given such uncertainties, it would ultimately be unfair to rest our decision on a waiver theory based on defendant's failure to bring a conditional cross-appeal of the class certification question in the first appeal twelve years ago.

Appellees' second waiver argument is based upon a "Memorandum to the Court" filed by the USIA after the 1982 reversal in which the Agency conceded:

> Ms. Medina, as an original named plaintiff and intervenor, was a proper representative of the class at the time of certification. The class claims of discrimination in hiring and retaliation have already been tried. The interests of the unnamed class members remain alive even though Ms. Medina's claim has become moot.

> Like the class representatives in *Sosna* [*v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)] and *Franks* [*v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976)], she has "simply 'left' the class, but the class remain[s] substantially unaltered. . . . [Her] mootness [is] not related to any factor also affecting the unnamed members of the class." *Kremens v. Bartley*, [431 U.S. 119, 132, 97 S.Ct. 1709, 1717, 52 L.Ed.2d 184 (1977)]. Claims of the class may, therefore, properly be considered in remand proceedings before this [c]ourt.

Memorandum to the Court (Nov. 24, 1982), *reprinted in* J.A. at 71, 72-73. Notably this letter was filed over five months after the Supreme Court's decision in *General Telephone Co. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), upon which the USIA now principally relies and nearly three months after this court's decision on appeal reversing the nonliability findings as to hiring claims. The Agency characterizes this memorandum as merely an explanation of why the dismissal of Ms. Medina's individual claim was not harmful to the class without expressing any concession as to the validity of the class certification itself. Indeed, the memorandum is ambiguous enough with regard to the USIA's position on the propriety of the class certification itself so as not to constitute a waiver of its earlier stated objection to the certification. Finding no waiver, we turn to the merits of the class certification challenge.

C. Class Certification

Rule 23 of the Federal Rules of Civil Procedure provides that a court may only entertain a class action if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED.R.CIV.P. 23(a). In addition to satisfying subsection (a) of Rule 23, a plaintiff must also demonstrate that one of the conditions under subsection (b) is met. The relevant criterion in subsection (b) for our purposes is that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED.R.CIV.P. 23(b)(2). Finally, subsection (c) provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." FED.R.CIV.P. 23(c)(1).

When the EEOC seeks classwide relief under Title VII on behalf of individuals discriminated against by a private employer, the conditions of Rule 23 need not be met in order to maintain the suit as a class action. *General Tel. Co. v. EEOC*, 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). However, Title VII does not similarly exempt non-EEOC plaintiffs from the

strictures of Rule 23. *Id.* at 330, 100 S.Ct. at 1706; *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405, 97 S.Ct. 1891, 1897, 52 L.Ed.2d 453 (1977).

1. ***The Former "Across-the-Board" Approach to Certification***

Beginning with the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir.1969), many courts permitted a plaintiff to launch an "across-the-board attack" on an employer's entire range of employment decisions. Such a challenge permitted a plaintiff who suffered discrimination as the result of one kind of employment decision (*e.g.*, hiring) to be the class representative as well for employees who were harmed by another kind of employment decision (*e.g.*, promotion). In these early cases, a court would certify an across-the-board class based solely on a complaint alleging group discrimination. Such an allegation alone was presumed sufficient to satisfy the commonality and typicality requirements for class certification under Rule 23. No additional particularized showing that the employer indeed followed a broad policy of discrimination across different employment decisions was deemed necessary. The underlying theory of this broad-based approach to class certification was that despite the "different factual questions with regard to different employees . . . the 'Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class.'" *Id.* at 1124 (quoting *Hall v. Werthan Bag Corp.*, 251 F.Supp. 184, 186 (M.D. Tenn. 1966)). *See, e.g., Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir. 1975), *cert. denied*, 421 U.S.

1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975); *Long v. Sapp*, 502 F.2d 34, 43 (5th Cir. 1974); *Gay v. Waiters' and Dairy Lunchmen's Union*, 549 F.2d 1330 (9th Cir. 1977); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 340 (10th Cir. 1975). *See generally Wagner*, 836 F.2d at 588-89 (discussing rise and fall of across-the-board challenges); *Council of & for the Blind, Inc. v. Regan*, 709 F.2d 1521, 1546-47 & nn. 61-62 (D.C. Cir.1 983) (en banc) (Robinson, C.J., concurring in part and dissenting in part) (same); *Griffin v. Dugger*, 823 F.2d 1476, 1484-87 (11th Cir.1987), *cert. denied*, 486 U.S. 1005, 108 S.Ct. 1729, 100 L.Ed.2d 193 (1988) (same).

2. East Texas Motor Freight *and* Falcon

While the Supreme Court has reaffirmed the principle that suits alleging discrimination on the basis of race, gender, or national origin "are often by their very nature class suits," it effectively repudiated the earlier line of appellate court cases that would automatically certify an across-the-board class based solely upon a complaint alleging group discrimination. *East Texas Motor Freight*, 431 U.S. at 405, 97 S.Ct. at 1897. *See also General Tel. Co. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). In these two cases, the Supreme Court established that class certification under Rule 23—even in Title VII group discrimination cases—could only be granted after a rigorous analysis of whether adjudication of the named plaintiffs' claims and those of the class would indeed share common issues of fact or law.

In *East Texas Motor Freight*, the Supreme Court reversed a court of appeals for certifying a class despite the fact that "it was evident by the time the case reached that court that the named plaintiffs were

not proper class representatives." 431 U.S. at 403, 97 S.Ct. at 1896. The court of appeals had not disturbed the trial court's finding that the named plaintiffs were not qualified for the positions that they were allegedly denied on the basis of their race or national origin. Nonetheless, the court of appeals had reasoned that "'the requirements of Rule 23(a) must be read liberally in the context of suits brought under Title VII'" and certified the class on appeal. *Id.* at 401, 97 S.Ct. at 1895 (quoting court of appeals). The Supreme Court reversed. While not fatal to the existence of a class that during trial its named representatives turn out not to be members of the class, *id.* at 406 n. 12, 97 S.Ct. at 1898, as an initial matter, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members," *id.* at 403, 97 S.Ct. at 1896 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 2929, 41 L.Ed.2d 706 (1974)) (citations omitted).

In *Falcon*, the Supreme Court further held that a plaintiff who had suffered promotion discrimination could not be *presumed* to qualify as a class representative for persons of similar national origin aggrieved by the employer's discriminatory hiring practices:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims

> will share common questions of law or fact and that the individual's claim will be typical of the class claims.

457 U.S. at 157, 102 S.Ct. at 2370 (footnote omitted). While this gap could be bridged by a specific showing that the employer's hiring and promotion practices shared a common policy of discrimination, the complaint in *Falcon* "contained no factual allegations concerning petitioner's hiring practices." *Id.* at 150, 102 S.Ct. at 2367. The Court held that the named plaintiff's complaint provided an insufficient basis to conclude that commonality would exist between the adjudication of his promotion discrimination claim and class members' hiring discrimination claim. Therefore, the district court had erred when it certified the class solely on the basis of the allegations in the complaint without holding an evidentiary hearing.

3. *The Case at Bar*

a. *Initial class certification*

Under current law, the trial court's initial class certification may well have exceeded the scope permitted by the pleadings. *See De Medina*, 686 F.2d at 1013 n. 11 ("recent Supreme Court precedent suggests that the class certified here may have been overbroad" (citing *General Tel. Co.*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740)). When in February of 1978 Ms. Hartman moved for class certification, she alleged that there were over 3,000 women currently employed at the USIA and that the number of job applicants presumably well exceeded this figure. She further alleged that defendant engaged in a "pattern of sex discrimination" which (1) invariably presented

"common questions of law and fact with respect to [d]efendant's conduct affecting the class," and (2) ensured that her claim was "typical of the class." J.A. at 24-28. Finally, the plaintiff alleged that she had competent counsel to represent the class and that her interests were not in conflict with those of the class. *Id.* at 28-29. Thus, apart from the specific factual allegations contained in the original complaint (regarding the USIA's failure to hire Ms. Hartman), the motion for class certification was largely conclusory in nature.

The USIA filed a memorandum in opposition to class certification, arguing, *inter alia*, that the class was imprecise, too large, and that ultimately plaintiff represented only herself. J.A. at 37. In particular, the Agency maintained that the plaintiff had not presented allegations warranting an "across-the-board" challenge to the entire range of defendant's employment practices, *i.e.*, a challenge to defendant's promotion as well as hiring decisions. It further claimed that certification was improper because the class included applicants for foreign service as well as civil service positions. The USIA argued that the two personnel systems "employ[ ] different procedures for considering and selecting applicants," and therefore, the Agency maintained, petitioner could not claim that her experience as an unsuccessful applicant for a *civil service* position was typical of all members in the class. J.A. at 43.

The USIA's opposition notwithstanding, the district court in April, 1978, conditionally certified the class of "all women who have applied for employment with or are currently employed by the [USIA] and who have been or continue to be adversely affected

by the [USIA's] discriminatory employment practices," with the following proviso:

> Although plaintiff's complaint does not state the policies or patterns of discrimination affecting the class with the specificity the [c]ourt would prefer, the [c]ourt will conditionally certify the class at this time. However, the [c]ourt would like to caution the plaintiff that this certification is "conditional" and may be modified by the [c]ourt at any time should the record later indicate such to be appropriate.

J.A. at 48. The court later modified the class to exclude all clerical employees and dismissed the class retaliation and class promotion claims. *Hartman v. Wick*, 600 F.Supp. 361; *De Medina*, 21 Fair Empl.Prac.Cas. (BNA) at 81. None of these subsequent rulings is challenged on appeal, and we are no longer faced with the kind of across-the-board class that underlay the Supreme Court's decision in *Falcon*. We hasten to add that the plaintiff nonetheless is not absolved of the duty to demonstrate the requisite commonality and typicality in order to maintain the suit as a class action. The question, then, is whether the trial court erred in certifying the class of all women who applied for employment at the USIA and were adversely affected by the Agency's discriminatory hiring practices.

b. Certification of class for hiring discrimination claim

(1) *Standard of review*

A district court exercises broad discretion in deciding whether to permit a case to proceed as a class action. *Bermudez v. United States Dep't of*

Agric., 490 F.2d 718, 725 (D.C. Cir.), *cert. denied*, 414 U.S. 1104, 94 S.Ct. 737, 38 L.Ed.2d 559 (1973). In light of the fact that trial courts have the primary responsibility of ensuring the "orderly management of litigation" and that the purpose of class actions lies in "advanc[ing] the efficiency and economy of multi-party litigation," trial courts "are uniquely well situated to make class certification decisions." *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984) (citations omitted). As a result, we review a class certification decision conservatively only to ensure against abuse of discretion or erroneous application of legal criteria. *Wagner*, 836 F.2d at 586.

(2) *Merits of certification*

The principal problem in the certification here is that it encompasses both civil service and foreign service applicants to the USIA, despite the fact that the two categories are hired under different personnel systems. Foreign service officers do not directly apply to the USIA, but must pass a general foreign service entry examination instead. Upon successful completion of this examination, foreign service applicants must further undergo an oral assessment of their qualifications. Neither of these steps, of course, is required of civil service applicants.

(a) *Representation across jobs generally*

Normally, an employee who was not aggrieved by a particular test or hiring requirement lacks standing to challenge that test or requirement. *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1409 (D.C. Cir.), *clarified on reh'g*, 852 F.2d 619 (1988), *cert. denied*, 490 U.S. 1105, 109 S.Ct. 3155, 104 L.Ed.2d 1018 (1989); *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 898 (5th Cir.), *cert. denied*, 439 U.S.

835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978). Accordingly, the Eleventh Circuit, for example, held that an incumbent plaintiff "complaining of a subjective decisionmaking process, could not represent [applicants] . . . who may have been victims of a discriminatory objective decisionmaking process." *Griffin v. Dugger*, 823 F.2d 1476, 1490-91 (11th Cir. 1987), *cert. denied*, 486 U.S. 1005, 108 S.Ct. 1729, 100 L.Ed.2d 193 (1988). But here, in contrast, plaintiffs did not challenge the foreign service entrance examination itself. Instead, they alleged that the USIA's hiring decisions made under either the civil service or foreign service personnel system intentionally discriminated against women.

The Supreme Court indicated in *Falcon* that "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion in the same general fashion, such as through entirely subjective decisionmaking processes." *Falcon*, 457 U.S. at 159 n. 15, 102 S.Ct. at 2371. *See Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 617 (5th Cir. 1983); *Griffin*, 823 F.2d at 1487; *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557-58 (11th Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986). Similarly, given sufficient proof, an unsuccessful applicant for one particular job can presumably challenge discriminatory hiring for different job categories where the primary practices used to discriminate in the different categories are themselves similar. While it may be prudent to have the class divided into sub-classes represented by a named plaintiff from each of the differing job categories, it would not be

necessary to the validity of the class certification to do so. Contrary to appellant's assertion, the Supreme Court in *East Texas Motor Freight* did not propound a requirement of precise "congruence" between the job categories of named plaintiffs and those of the putative class. *East Texas Motor Freight* only held that certification was unwarranted when at the time of certification it was abundantly clear that plaintiffs were not members of the class. *See Cook v. Boorstin*, 763 F.2d 1462, 1471 (D.C. Cir. 1985); *Carpenter*, 706 F.2d at 617.

In other words, we are unwilling to hold as a matter of law, that a named plaintiff who unsuccessfully applied for one job can never represent an employee who unsuccessfully applied for another job simply because the application process for the second job included a separate and different element. Indeed such a restriction would permit an employer to defeat the broad enforcement of Title VII simply by administering different objective tests as part of the application process for each job. *See Cook*, 763 F.2d at 1469 ("the plethora of job categories at the higher levels of the federal bureaucracy and in many other white collar organizations suggests that adopting [the agency]'s approach to proof of discrimination [which would have limited each proof of discrimination to evidence regarding only one job category] could well preclude the effective use of statistics in combatting race discrimination in many if not most areas of high-level employment"). Thus, where a plaintiff charges that subjective employment decisions have allowed the employer systematically to discriminate on the basis of gender in choosing among the minimally qualified applicants, the potential for common issues of law and fact among applicants for different positions clearly

exists regardless of individual differences in job descriptions or minimal qualifications. *See also Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549, 1572-73 (11th Cir. 1988) (commonality does not require identity of every factual and legal issue raised by the named plaintiff and the class members), *vacated on other grounds*, 493 U.S. 929, 110 S.Ct. 316, 107 L.Ed.2d 307 (1989). The fact that the named plaintiffs do not possess the necessary qualifications for the foreign service positions at the USIA, *e.g.*, completion of the foreign service entry examination, or that the USIA's hiring of foreign service officers differs in *some* respects from hiring of civil service officers, does not in itself preclude the named plaintiffs from representing the entire class.

(b) ***The class cutting across jobs here***

At the same time, however, we are unable to locate in the record sufficient positive findings of commonality and typicality as to the types of discriminatory practices utilized in hiring both groups to permit affirming the trial court's original class certification encompassing both civil service and foreign service applicants. Put simply, the record does not adequately demonstrate either that a class exists or that the named plaintiffs are the proper representatives of that class. While plaintiffs' statistics may have demonstrated that discrimination against women applicants to the six USIA job categories was afoot, nothing in the record so far permits the additional inference that class members suffered a *common* injury.

As *Falcon* made clear, there is more to a showing of commonality than a demonstration that class plaintiffs suffered discrimination on the basis of member-

ship in a particular group. The trial court in *Falcon* had determined that the employer's hiring decisions had discriminated against members of the named plaintiff's national origin. 457 U.S. at 159, 102 S.Ct. at 2371. That fact alone did not suffice to satisfy the commonality and typicality requirements of Rule 23. "What the Court demands from those seeking certification of a class cutting across employment status [*e.g.*, applicants and incumbents] or job categories is a 'specific presentation' identifying the questions of law or fact common to the class representative and the members of the class proposed." *Wagner*, 836 F.2d at 589 (footnote omitted). While in a case alleging intentional discrimination, such as this one, a plaintiff need not isolate the particular practice and prove that such practice *caused* the discrimination, plaintiffs must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions.

In a motion for class certification, the plaintiff bears the "obligat[ion] to show, in at least a preliminary fashion, the required commonality between her claims and those of the putative class." *Nelson v. United States Steel Corp.*, 709 F.2d 675, 680 (11th Cir. 1983) (citations omitted). Ms. Hartman's complaint and motions for class certification, however, evince a complete absence of factual allegations regarding the commonality or typicality requirements of Rule 23. This failure is compounded by the fact that prior to entry of the conditional class certification, the trial court apparently did not conduct any evidentiary hearing or other factual determination that would

qualify as a rigorous analysis of whether the prerequisites for a class action had been met.

(c) *The inclusion of foreign service officers in the class*

The lack of a specific foundation for treating women applicants to USIA as a class *a fortiori* undermines the further effort to branch out and include foreign service officers in the plaintiff class. Challenging in particular the existence of commonality between the civil service and foreign service components of the current class, defendant seeks to introduce new statistics demonstrating that when broken down between the two categories, hiring figures do not even bear out a *prima facie* claim of hiring discrimination for the foreign service portion of the class. Brief for Appellants at 34. Whether to consider new evidence after the close of the liability portion of a bifurcated trial is a decision initially to be made by the district court. The trial court's refusal to reconsider its liability determination based upon such newly-minted statistics is reviewed under the abuse-of-discretion standard. *See Segar v. Smith*, 738 F.2d 1249, 1285 (D.C. Cir. 1984); *Trout v. Lehman*, 702 F.2d 1094, 1106 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056, 104 S.Ct. 1404, 79 L.Ed.2d 732 (1984). That having been said, we are still unable, on appeal, to find sufficient support in the old trial statistics alone to uphold class certification.

In the course of the liability trial, the district court on the basis of employment data that did not differentiate between civil service and foreign service officers determined that the Agency did discriminate against women job applicants for six job categories. This determination *assumes*, and therefore cannot in

itself suffice to establish, commonality and typicality among women civil service and foreign service applicants for any given position at the USIA. Moreover, since the district court did not make any findings at the time of class certification, and its 1984 liability judgment was based solely on an unrebutted *prima facie* case made out by statistics, there is no other trial evidence to which we might turn.[4] While statistics can generally be probative of the question of commonality, we would feel uncomfortable in resting on the trial statistics in the present record for a final determination of commonality. *Cf. Carpenter*, 706 F.2d at 617 ("The statistical proof of channeling . . . and the anecdotal testimony of female . . . employees presented at trial set forth common issues of law and fact"); *Cook*, 763 F.2d at 1472 ("Plaintiffs in this case appear to have met the [commonality and typicality] requirement amply by presenting affidavits and memoranda suggesting that the [employer]'s subjective standards for advancement have resulted in systematic discrimination against blacks and other minorities."); *Griffin v. Carlin*, 755 F.2d 1516, 1532 (11th Cir.1985) ("22 named plaintiffs had alleged sufficiently diverse employment practices that the court might infer that discriminatory treatment was typical of defendant's promotion practices and that defendant's promotion practices were motivated by a pervasive policy of racial discrimination"); *Bishop v. New York City Department of Housing Preserva-*

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[4] The district court's only explicit discussion of the difference between civil service and foreign service personnel systems to be found is in the 1988 remedial order and is not directed to the issue of class certification. *See Hartman*, 678 F.Supp. at 321-22.

tion and Development, 141 F.R.D. 229 (S.D.N.Y.1992) (finding that statistical and anecdotal evidence supported commonality claim); *see generally* 2 EMPLOYMENT DISCRIMINATION LAW §§ 2402-10 (LAWYERS COOPERATIVE PUB. 1993).

We emphasize that there is no requirement in this circuit that a trial court conduct an evidentiary hearing or make specific factual findings on the issue of class certification in every case. But in this instance the paucity of the record on the question of appropriate class certification effectively precludes us from performing our reviewing task. *Compare Berger*, 843 F.2d at 1409 ("[W]e find the [d]istrict [c]ourt's failure to articulate the reasons for its decisions [to certify the class] an insufficient reason to remand.") and *Postow v. OBA Fed. Savings & Loan Ass'n*, 627 F.2d 1370, 1380-81 n. 24 (D.C. Cir. 1980) (finding no abuse of discretion in certifying class where district court did not hold hearings) *with Fink v. National Savings and Trust Co.*, 772 F.2d 951, 960-61 (D.C. Cir. 1985) (remanding in part because absence of specific findings made review of class certification decision impossible).

D. *Remand*

Relying on this court's decision in *Berger*, and the Seventh Circuit's decision in *Ekanem v. Health and Hospital Corp.*, 724 F.2d 563, 573 (7th Cir. 1983) (as modified 1984), *cert. denied*, 469 U.S. 821, 105 S.Ct. 93, 83 L.Ed.2d 40 (1984), the USIA argues that the appropriate remedy in this case is decertification and dismissal of the judgment against the Agency. *Berger*, however, only indicates that a named plaintiff cannot bring a class action challenge to a specific hiring requirement that did not cause the plaintiff any

injury within the applicable statutory time limit. 843 F.2d at 1409-11. Similarly, *Ekanem* held that because none of the named plaintiffs had filed the necessary EEOC charges relating to the class claims that survived a trial on the merits, decertification of the class with respect to the surviving class claims was the proper disposition. 724 F.2d at 573. As discussed above, here the named plaintiffs claim that they suffered an injury by virtue of a discriminatory hiring policy that pervaded the USIA's decisions to hire its civil service and foreign service officers. In other words, *if* the same hiring practice operated to discriminate against women applicants throughout the civil service and foreign service personnel systems, then the named plaintiffs are indeed proper class representatives for civil service and foreign service applicants alike.

The question ultimately is whether members of the plaintiff class—whether foreign service or civil service applicants—share a common injury. While prior to the Supreme Court's *Falcon* decision, the issue of class certification may have come to rest with the simple allegation of gender discrimination, since the *Falcon* decision, a court must conduct a more rigorous inquiry into commonality and typicality. We find no evidence of such a directed inquiry in this record nor can we locate evidence in the record that would make such an inquiry unnecessary at this late date.[5]

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[5] The conditional nature of the original class certification appears to be immaterial to the current challenge that certification was improper. The court has treated the class as certified since that first order and has modified the class since the original certification order. Accordingly, our inquiry focused on whether the class as currently certified can be upheld on appeal.

Of course the district court should consider first whether class certification back in 1978 was proper. However, even if class certification in 1978 was premature, it may nonetheless be proper now. The district court would have to ask whether the evidence currently supporting class certification *could only* have been developed *as a result* of the initial (improper) decision to certify the class. Evidence that *could not have* entered the district court's ken except as a result of class certification should presumably not factor into an *ex post* decision of whether class certification was proper. Since appellant's principal challenge is that the trial statistics which led to the liability decision are premised on the (improper) class certification, and since we do not expect the district court to rely solely on the trial statistics in its reevaluation of the propriety of class certification, we would not expect that premature class certification would have undermined any other evidence which might support class certification now. The district court, however, will have ample opportunity to consider this issue on remand. The district court may also consider creating sub-classes, certifying a narrower class, or adding additional class representatives. *See Fink*, 772 F.2d at 960-61; *Holsey v. Armour & Co.*, 743 F.2d 199, 205 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 784 (1985) (permitting intervention after trial and before entry of judgment); *Carpenter*, 706 F.2d at 617; *Satterwhite v. Greenville*, 634 F.2d 231 (5th Cir. 1981) (in banc).

Although reluctant to dictate another chapter in this epic litigation, we can discern no principled course other than to remand this case to the trial

court to reconsider the question of class certification, and to follow that determination with whatever is necessary to conclude the proceeding.

Remanded.

RANDOLPH, Circuit Judge, concurring, in which Circuit Judge HENDERSON joins:

On remand, the district court conscientiously reconsidered its 1978 conditional certification of the class and, after briefly describing *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), decided to adhere to its earlier decision, although the court recognized that under Rule 23(c), Fed.R.Civ.P., it "could even now deny certification." *Hartman v. Wick*, 600 F.Supp. 361, 367 n. 2 (D.D.C.1984). The Agency quite obviously could not have challenged, in the 1982 appeal, this 1984 ruling. The Agency's failure to take a cross-appeal therefore could not have waived its objections to the ruling. The current appeal is the Agency's first and only chance for appellate review of the district court's decision to maintain its original class certification despite *Falcon*. For that reason alone the certification issue is before us.

I agree with the balance of the court's opinion and therefore respectfully concur.

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 77-2019 (CRR)

CAROLEE BRADY HARTMAN, ET AL., PLAINTIFFS

v.

JOSEPH DUFFY, DEFENDANT

[Filed: Nov. 23, 1994
As Amended Jan. 9, 1995]

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

INTRODUCTION

The above-captioned case is before the Court on remand from the Court of Appeals following its decision of April 5, 1994, in which it directed this Court "to reconsider the question of class certification, and to follow that determination with whatever is necessary to conclude the proceeding." *Hartman v. Duffey*, 19 F.3d 1459, 1475 (D.C. Cir. 1994). Pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-2000e-17, this case was initiated in 1978 on behalf of a large number of women who

unsuccessfully applied for civil service or foreign service positions with the United States Information Agency ("USIA" or "Agency"). By order of April 18, 1978, the Court certified this case as a class action, with the class consisting of "all women who have applied for employment with or are currently employed by the United States Information Agency and who have been or continue to be adversely affected by the discriminatory employment practices of the defendant." On November 16, 1984, the Court found that the Defendant had "discriminated against women as a class with regard to hiring" in six occupational categories at the defendant agency. *Hartman v. Wick*, 600 F.Supp. 361, 375 (D.D.C. 1984). That opinion also details the background of this lengthy litigation, as does *De Medina v. Reinhardt*, 686 F.2d 997, 1000-01 (D.C. Cir. 1982), an appeal of an earlier decision in this case.

Thereafter, in January 1988, the Court ruled on the framework for the relief to be afforded the Plaintiff class. *Hartman v. Wick*, 678 F.Supp. 312 (D.D.C. 1988). Under this scheme, class members who had applied for a civil service position at the USIA would be given individualized *Teamster*[1] hearings to assess appropriate relief, while class members who applied for foreign service jobs at the USIA would be permitted to compete for a designated number of such positions to be specifically set aside by the USIA for class relief purposes. With the consent of both parties, the

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[1] *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 372, 97 S.Ct. 1843, 1873, 52 L.Ed.2d 396 (1977).

Court then appointed a Special Master[2] to proceed with individualized *Teamster* hearings for each class member who applied for a civil service position, and to recommend to the Court a specific number of foreign service positions to be specially set aside by the Agency for class relief purposes.

In July 1992, the Court ordered the USIA to set aside thirty-nine foreign service positions over the next three years for women on the rank-ordered list of unsuccessful foreign service applicants. *Hartman v. Gelb*, No. 77-2019, 1991 WL 202367 (July 9, 1992). Appealing from that order, the Defendant challenged the designated number of remedial foreign service positions, the 1984 liability determination, and the 1978 class certification. Not reaching the liability finding or the issue of the number of reserved slots, the Court of Appeals found that, based on the record before it, the Court could not decide that the suit was properly certified as a class action. Thus, the case was remanded to this Court for reconsideration of the issue of class certification. *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994).

On remand, the Plaintiffs argue that class certification is proper because four types of discrimination existed in all six job categories at issue: (1) overt discrimination and express limitations on employment of women; (2) gender-biased evaluations and disparate application of subjective selection criteria; (3) discouragement of female applicants; and (4) preselection of male applicants and use of discriminatory recruiting devices. In support of this contention,

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[2] The Court appointed a Special Master, Professor Stephen A. Saltzburg, pursuant to Rule 53 of the Federal Rules of Civil Procedure.

the Plaintiffs supply detailed anecdotal evidence taken from the 1979 liability trial as well as from additional sworn testimony of proposed intervenors and other class members. In light of the Court of Appeals' decision, the Plaintiffs have also filed a Motion to Intervene which names twenty additional Plaintiffs as class representatives. The Plaintiffs argue that the proposed intervenors' inclusion as class representatives leaves no doubt that class certification covering all six job categories is proper.

With regard to the class certification issue, the Agency contends that the Plaintiffs have not and cannot show the existence of a common, pervasive policy of discrimination that impacts all members of the Plaintiff class. The Agency bases this conclusion on its own assertion that this Court is limited to the existing record, such that virtually all of the facts and circumstances alleged by the Plaintiffs in their briefs may not be considered. The Agency further argues that the named Plaintiffs' claims are not typical of the class and that named Plaintiff Hartman lacks sufficient standing to raise issues concerning either gender-based evaluations and discriminatory application of subjective criteria or concerning the discouragement of female applicants for positions at the USIA. The Defendant concludes that, absent the existence of a pattern and practice of discrimination, the Court has no choice but to decertify the Plaintiff class and allow for the filing of separate, discrete, individualized suits by all the Plaintiffs who have asserted claims in this case.

With regard to the intervention issue, the Defendant contends that the Petitioners' application is not timely and that granting intervention would lead to relitigation of the entire case. The Agency also

argues that the intervenors' new challenges are time-barred for failure to exhaust administrative remedies.

The Court has carefully considered the parties' written submissions, their oral arguments, the applicable law, and the entire record in this case, with careful attention paid to the evidence before the Court at the time of the 1979 liability trial. For the reasons discussed herein, the Court finds that the Plaintiffs have satisfied the requirements set forth in Rule 24(a) of the Federal Rules of Civil Procedure for intervention as of right. In addition, the Court finds that class certification is proper, as members of the applicant class share a common injury, namely, the denial of employment as a result of Agency-wide overt discrimination against applicants on the basis of their gender. Accordingly, the Court shall grant the Petitioners' Motion to Intervene, and deny the Defendant's Motion to Decertify the Applicant Class.

DISCUSSION

I. THE COURT FINDS THAT THE PETITIONERS ARE ENTITLED TO INTERVENTION OF RIGHT UNDER RULE 24(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The standard for intervention of right is set forth in Rule 24(a) of the Federal Rules of Civil Procedure:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:
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> * * * * *
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that

> the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed.R.Civ.P. 24(a). Thus petitioners in a Title VII class action are entitled to intervention of right if they meet all the factors of Rule 24(a): (1) timeliness; (2) interest; (3) practical impairment; and (4) inadequacy of representation. *Cook v. Boorstin*, 763 F.2d 1462, 1466-71 (D.C. Cir. 1985). In the instant case, the Court finds that the Petitioners have met all four factors and are therefore entitled to intervene in this matter.

A. Timeliness

The first requirement for intervention of right is a timely application for intervention. Intervention is timely even after entry of judgment if the Petitioners moved to intervene "as soon as it became clear . . . that the interests of the unnamed class members would no longer be protected by the named class representatives." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394, 97 S.Ct. 2464, 2470, 53 L.Ed.2d 423 (1977). *See, e.g., Cook*, 763 F.2d at 1466 (petitioners' motion for intervention was timely when filed five weeks after denial of class certification); *Hill v. Western Electric Co.*, 672 F.2d 381, 386 (4th Cir.), *cert. denied*, 459 U.S. 981, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982) (petitioners' motion for intervention was timely when filed within ninety days of United States Supreme Court's denial of plaintiffs' writ of certiorari). The Petitioners in the instant matter claim that their Motion to Intervene is timely because it was filed twenty-five days after the date of the Court

of Appeals' opinion remanding the issue of class certification.

The Court agrees that the Petitioners' motion is timely. The Petitioners promptly moved for intervention following the Court of Appeals' finding that the propriety of class certification was in question. Moreover, the Court of Appeals specifically suggested that this Court consider adding additional class representatives in its consideration of whether class certification is proper at the present time. *Hartman*, 19 F.3d at 1474. The Petitioners responded to that suggestion as soon as they learned that, in light of the Court of Appeals' concern with the propriety of the class as certified, their interests may not be adequately represented by the named Plaintiffs.

The Defendant asserts that the Petitioners' Motion to Intervene is sixteen years too late, and that the Plaintiffs should have recognized the possible need for intervention after the conditional class certification in 1978, during the course of the 1979 liability trial, or subsequent to the 1982 appeal.[3] The Court

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[3] The Defendant further contends that intervention by new class representatives would require full discovery and a new liability trial, and that "to avoid such a horrendous result is precisely the reason for the timeliness requirement of Rule 24." Defendant's Amended Memorandum of Points and Authorities in Opposition to Plaintiffs' Request to Certify the Applicant Class, filed June 14, 1994, at p. 27. The Defendant makes this argument largely in response to the Petitioners' contention that the Court should reinstate the liability determination upon finding that intervention is proper. *See Hill v. Western Electric*, 672 F.2d 381 (4th Cir.), *cert. denied*, 459 U.S. 981, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982); *Goodman v. Lukens Steel*, 777 F.2d 113 (3d Cir.), *aff'd*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987). The Court reminds the Defendant that it has already held a full trial on the issue of

finds these arguments without merit. The time elapsed from the inception of the litigation is only one factor to be considered in determining the propriety of intervention. *Hill*, 672 F.2d at 386. Moreover, a Court must assess timeliness in relation to the specific purpose intervention will serve. *United States v. American Telephone & Telegraph Co.*, 642 F.2d 1285, 1294 (D.C. Cir. 1980). In the instant case, the Petitioners seek intervention in response to the Court of Appeals' recent concerns and directive regarding the class certification issue. Prior to this point, the Plaintiffs' position on class certification had not been seriously called into question. On April 19, 1978, the Court conditionally certified the class; in

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liability, found for the Plaintiffs on remand from the Court of Appeals, and issued a detailed opinion setting forth the procedures for obtaining relief. These procedures include the institution of individual *Teamster* hearings for civil service applicants before the Special Master. The Petitioners seek redress only to the extent already determined by the Court in its liability finding and each Petitioner is an active class member who has filed claims for relief under the Court's remedial order. The Defendant has ample opportunity to challenge the individual claims of each intervenor, as it has with respect to every other member of the Plaintiff class, at the hearings before the Special Master. With regard to the foreign service applicants, the Court has already ordered the Defendant to create a rank-ordered list, for each year at issue, of the women who unsuccessfully applied for foreign service positions at the USIA, and to set aside thirty-nine foreign service positions for class members. *See Hartman v. Wick*, 678 F.Supp. 312 (D.D.C. 1988). Furthermore, the Petitioners have already sought re-evaluation of their candidacy for these positions. Motion to Intervene, filed April 29, 1994, at p. 12. Intervention of additional class representatives does not in any way alter the relief awarded foreign service applicants, so further discovery on individual claims is not warranted.

September of that year, the Court permitted three Petitioners to intervene as named Plaintiffs; and on remand, class certification was not seriously challenged.

The Defendant points out that, in its 1982 decision, the Court of Appeals recognized that the decision of the Supreme Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), may raise some questions regarding the breadth of the class, which then included both applicants and employees. *De Medina v. Reinhardt*, 686 F.2d 997, 1013 (D.C. Cir. 1982). In a memorandum to this Court regarding the precise issue of class certification, however, the Defendant concluded that, because a proper class representative existed, the class members' claims may properly be considered on remand proceedings before the Court. Defendant's Memorandum to the Court, filed November 24, 1982, at p. 3. Thus, when given the express opportunity to brief the issue of class certification and put the Court on notice of questions regarding the propriety of the class representatives, the Defendant assured the Court that these issues did not warrant further attention and that the Agency was prepared to proceed with resolving what remained before the Court.

The Government contends, as the Court of Appeals found, that this memorandum did not constitute a waiver of any objection to the Court's determination of the propriety of any Rule 23(b)(2) certification. *Hartman v. Duffey*, 19 F.3d 1459, 1468 (D.C. Cir. 1994). Even if this memorandum did not constitute a waiver notwithstanding all the years passed before the issue of class certification was raised before the Court of Appeals, however, in view of the fact that it has been labelled "ambiguous" by the Court of Ap-

peals, *Hartman v. Duffey*, 19 F.3d at 1468, this Court finds that the memorandum should, at least, be construed against its authors such that any doubt or ambiguity regarding its purpose and effect is resolved in favor of the Plaintiffs. Accordingly, construing the ambiguous Government-authored memorandum in the Plaintiffs' favor, the Court finds that the Plaintiffs are not now barred from adding new class representatives, as they could and likely would have done back in 1982 but for the Government's ambiguity and seeming complacency with the very issue now before the Court, the propriety of class certification.

The Court thus concludes that only when the Court of Appeals recently remanded the issue of class certification and suggested the addition of class representatives was there any need for the Petitioners to come forward. Therefore, the Court finds that the Petitioners have satisfied the timeliness criterion of Rule 24(a).

B. Interest and Practical Impairment

The second and third requirements for intervention of right are that the Petitioners claim "an interest relating to the property or transaction which is the subject of the action" and that the "disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." Fed.R.Civ.P. 24(a)(2). The Court finds that the Petitioners have met the interest and practical impairment requirements of Rule 24(a)(2).

The interest requirement "'is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Cook*, 763 F.2d at 1466 (quoting *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C.

Cir. 1981)). The Petitioners must have suffered injury from wrongful acts that were similar to those complained of by the original Plaintiffs, and their claim for relief must be founded on the same statutory rights as the Plaintiffs' claims, even if the individual acts of discrimination alleged differ. *Id.* (citing *Foster*, 655 F.2d at 1324-25). The Court finds the Petitioners' arguments that they have an interest in this matter convincing. The Petitioners have suffered injury from similar wrongful acts alleged by the Plaintiffs and their claims are based on the same statutory rights which protect against discrimination by potential employers.[4] Moreover, the Petition-

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[4] For example, the Petitioners claim that, while Plaintiff Carolee Brady Hartman alleged that she was denied a position as a Writer/Editor because, she was told, the Defendant was looking for a male to fill the job, Petitioner Patricia De Young alleged that she was denied numerous positions in foreign affairs because, she was told, the Defendant was seeking only males. Similarly, Petitioner Jahanara Hasan alleges that, when she was denied Foreign Language Broadcaster positions, she was told that the Defendant intended to hire a male and that broadcasting was too strenuous a job for a woman. Petitioner Michal Shekel alleges that when she was denied a position, she was told she had a "girl's voice" and a "guy's name." Petitioner Carolyn Turner alleges that when she was denied positions, she was told that hiring her might hurt her marriage and that a female producer would pose additional costs. Finally, Petitioner Shirley Hill Witt alleges she was denied a Foreign Service Officer position because the agency had "enough women in the Foreign Service at mid-level." *See* Petitioners' Motion to Intervene, filed April 29, 1994, at pp. 10-11.

The Defendant takes great pains to challenge the merits of each Petitioner's claim and argue that they are not proper class representatives. However, "[a]n application to intervene should be viewed on the tendered pleadings—that is, whether

ers contend that they have an interest because they are each class members in whose favor the Court has issued a liability determination and set forth a procedure for obtaining relief. The similarity between the factual and legal claims of the Petitioners and those of the Plaintiffs amply satisfies the interest requirement.

With regard to the practical impairment prong of Rule 24(a), the Petitioners assert that, because they are challenging the same discriminatory policy exhibited through the same or similar subjective hiring practices as those the Plaintiffs experienced, the potential *stare decisis* effects of a ruling denying intervention would, as a practical matter, impair their interests. *See Cook*, 763 F.2d at 1466-67 (potential *stare decisis* effects deemed sufficient to satisfy Rule 24(a)(2) practical impairment requirement).

Significantly, the Defendant has failed to submit any convincing challenge to the Petitioners' arguments with respect to either the interest or the practical impairment requirements of Rule 24(a). Indeed, in the Defendant's Opposition, the Agency concedes that "some of the intervenors' claims meet the second and third criteria for intervention since they have an interest in the suit and that interest may be impaired or impeded by resolution of these issues." Defendant's Opposition, at p. 27. The Defendant goes on to argue, however, that the Petitioners who applied for

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those pleadings allege a legally sufficient claim or defense and not whether the applicant is likely to proceed on the merits." *Williams & Humbert Ltd. v. W & H Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988). Accordingly, the Court finds that the Defendant's arguments on the merits of the Petitioners' claims have no bearing on its determination of whether intervention of right is proper.

technical and foreign service positions *may* not have an interest in the case *should* the Court find that the class was improperly certified with respect to those positions. The Court finds that this conjecture is not relevant to the issue at hand, namely, whether the Petitioners have a current interest in the suit and whether that interest may be impaired by disposition of the suit. In view of Petitioners' current interest in the outcome of this litigation, along with the variety of ways the decision on remand could potentially impair the Petitioners' interests, the Court finds that the interest and practical impairment prongs of Rule 24(a) are met here.

C. Adequacy of Representation

The fourth requirement for intervention of right is that the Petitioners' interests be adequately represented by the existing parties. This requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972). In addition, the party opposing intervention bears the burden of demonstrating the inadequacy of representation. *United States v. American Telephone & Telegraph Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980).

In the instant case, the Court of Appeals suggested that class representation may not be adequate because, in particular, both civil service and foreign service jobs are encompassed by the class. *See Hartman*, 19 F.3d at 1472. The Petitioners argue that, given the Court of Appeals' language on the subject, the class *may* not be adequately represented

and, notably, the Defendant agrees.[5] Defendant's Opposition, at p. 29. Consequently, the Court finds that inadequacy of representation exists for purposes of Rule 24(a).

D. Exhaustion of Administrative Remedies

In a further attempt to defeat intervention, the Agency argues that the intervenors' new challenges are time-barred since they failed to exhaust their administrative remedies. Defendant's Opposition, at p. 18. Moreover, the Agency contends that only Ms. Hartman has filed an administrative class complaint, and her complaint failed to identify any specific employment practice she sought to challenge. *Id.* at p. 20. The Court finds, however, that the intervenors' claims are not time-barred.

It is undisputed that exhaustion of administrative remedies is a prerequisite to filing an employment discrimination suit under Title VII. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 93 S.Ct. 1817, 1822, 36 L.Ed.2d 668 (1973); *Jarrell v. United*

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[5] The Defendant argues that such a finding compels decertification of the Plaintiff class under the Rule 23(a) of the Federal Rules of Civil Procedure. Defendant's Opposition, at pp. 29-30. The Agency cites no authority, however, in support of its implicit assumption that a finding of inadequacy of class representation under Rule 24(a) dictates the outcome of this Court's inquiry as to adequacy of class representation under Rule 23(a). Pursuant to the Supreme Court's discussion in *Trbovich*, the Petitioners have merely asserted that the representation of their interests *may* be inadequate for Rule 24(a) purposes in light of the Court of Appeals' decision remanding this case for consideration of the class certification issue. *See Trbovich*, 404 U.S. at 538 n. 10, 92 S.Ct. at 636 n. 10 (1972). The question of the propriety of class certification is a separate inquiry, and the Court shall treat it as such below.

States Postal Service, 753 F.2d 1088, 1091 (D.C. Cir. 1985). In addition, it is well settled that once an individual complainant has filed charges with the Equal Employment Opportunity Commission ("EEOC"), absent class members need not also exhaust administrative procedures in order to participate in a class action suit. *Abermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 2370 n. 8, 45 L.Ed.2d 280 (1975); *League of United Latin American Citizens v. Hampton*, 501 F.2d 843, 847 (D.C. Cir. 1974). The Court of Appeals for this Circuit has recited the rationale behind this rule: "'It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with EEOC.'" *Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981) (quoting *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968)). In addition, the *Foster* Court identified "the critical factor in determining whether an individual Title VII plaintiff must file an EEOC charge, or whether he may escape this requirement by joining with another plaintiff who has filed such a charge, is the similarity of the two plaintiffs' complaints." *Id.* A district court must be alert to "a real possibility that one of the claims might be administratively settled while the other can be resolved only by the courts." *Id.*

The Agency cites *Foster* as support for its contention that the intervenors must file separate complaints with the EEOC and cannot assert their claims in federal court via Ms. Hartman's proper exhaustion of administrative procedure. Defendant's Opposition, at p. 21. However, the *Foster* Court held that the intervenors in that case had asserted claims of discrimination so similar to those asserted by the original plaintiffs that no purpose would be served by

requiring them to file separate charges with the EEOC. *Foster*, 655 F.2d at 1323. In *Foster*, the plaintiffs filed suit alleging racial discrimination under Title VII by labor organizations and employers in matters relating to employment as pile drivers. The plaintiffs were four members of the defendant labor union, one of which received a right-to-sue letter from the EEOC. The District Court denied class certification, and three individuals who were *not* members of the defendant union moved to intervene, alleging they had suffered the same kinds of discrimination. *Id.* at pp. 1320-21. The district court denied their motion, but the Court of Appeals found that, because the intervenors alleged facts indicating that they were similarly situated and received the same discriminatory treatment, intervention was proper. The Court of Appeals reasoned:

> This discriminatory treatment constitutes the basis for both appellants' and the original plaintiffs' Title VII claim for relief. This being so, the EEOC charge filed by one of the original plaintiffs served the principal functions of the EEOC filing requirement, enabling the EEOC to provide the alleged wrongdoer with notice and to permit possible conciliation.

Id. at 1323 (citations omitted).

In the instant case, the Court finds "sufficient similarity between these claims to doubt the likelihood that conciliation would prove successful as to one where it had failed as to the other." *De Medina v. Reinhardt*, 686 F.2d 997, 1013 (D.C. Cir. 1982). Ms. Hartman's EEOC filing put the Agency on notice and provided the opportunity for possible settlement. Moreover, like Ms. Hartman, each class member and

intervenor bases her claim on the Defendant's failure to hire her, each alleges she was qualified for the positions sought, and each alleges that the Defendant denied her employment on the basis of her gender. The Court concludes that the class members' and intervenors' complaints are similar enough to those of Ms. Hartman that the individual filing of multiple EEOC complaints was not necessary, nor would it have been efficient. As the Court of Appeals for this Circuit has observed, "[a]lthough the specific circumstances giving rise to the grievances of each of the plaintiffs and the would-be intervenors in this case are distinguishable, each of the employees [seeks to show] the same thing: a pervasive 'pattern and practice' of racial discrimination" in hiring throughout the Agency. *Cook v. Boorstin*, 763 F.2d 1462, 1466 (D.C. Cir. 1985).

In sum, the Court finds that the Petitioners' Motion to Intervene meets all four requirements for Rule 24(a) intervention of right.[6] Accordingly, the

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[6] The Petitioners argue, in the alternative, that they are entitled to permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. Permissive intervention may be granted "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed.R.Civ.P. 24(b). In ruling on a motion for permissive intervention, "the court [must] consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* Although the Court need not reach the issue of permissive intervention because it finds that the Petitioners are entitled to intervene as of right, the Court observes that permissive intervention would also be proper in this case, because the Petitioners, as class members, assert claims that share common issues of law and fact with the main action, and because intervention will facilitate disposition of this case without prejudicing either party's rights.

Court shall grant the Petitioners' Motion. The Court notes that intervention here has "the virtues of conserving judicial resources and of avoiding the risk of inconsistent sequential adjudications of the critical issues." *Hill v. Western Electric*, 672 F.2d 381, 387 (4th Cir.), *cert. denied*, 459 U.S. 981, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982). Moreover, the Court finds that the intervenors need not exhaust their administrative remedies before filing suit in federal court, as their complaints are sufficiently similar to that of Plaintiff Hartman who did follow requisite administrative procedures before filing a complaint with this Court.

II. THE COURT FINDS THAT CERTIFICATION OF THE PLAINTIFF CLASS IS PROPER

Rule 23 of the Federal Rules of Civil Procedure sets forth the standards for class certification. A class may be certified when:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). A "shorthand way of combining [these] requirements is to ask whether a class action would serve as an efficient method of litigating the issues in the case." *Duggan v. Bowen*, 691 F.Supp. 1487, 1502 (D.D.C. 1988) (citing *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410-11 (D.C. Cir. 1984)). In addition, a party seeking certification under Fed.R.Civ.P. 23(b)(2), as in the instant case, must also be able to show that those opposing the class acted or

refused to act on "grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[7] The Plaintiffs satisfy these criteria.

In reviewing class certification in the instant case, the Court of Appeals focused on the commonality and typicality requirements of Rule 23(a), and characterized "[t]he question ultimately [as being] whether members of the plaintiff class—whether foreign service or civil service applicants—share a *common injury*." *Hartman*, 19 F.3d at 1472. The Court recognized that, normally, a Plaintiff lacks standing to challenge a test or requirement unless she or he was injured by that test or requirement. *Id.* at 1471. In the instant case, the Plaintiffs challenge both the foreign service and the civil service hiring procedures. However, the Court of Appeals explained that "given sufficient proof, an unsuccessful applicant for one particular job can presumably challenge discriminatory hiring for different job categories where the primary practices used to discriminate in the different categories are themselves similar." *Id.* at 1472. Thus, notwithstanding the Defendant's argument that certification is improper here because two personnel systems are at issue, certification of the Plaintiff class is proper if the Plaintiffs make "a 'specific presentation' identifying the questions of law or fact common to the class representative and the members of the class proposed." *Wagner v. Taylor*, 836 F.2d 578, 589 (D.C. Cir. 1987). The Court finds that the Plaintiffs have made such a showing.

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[7] The Defendant has not challenged the Plaintiffs' ability to meet this criterion.

Commonality is satisfied where the "plaintiffs' claims revolve around questions of law that will affect all members of the potential class." *Littlewolf v. Hodel*, 681 F.Supp. 929 (D.D.C. 1988), *aff'd*, 877 F.2d 1058 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1043, 110 S.Ct. 837, 107 L.Ed.2d 832 (1990). The rule "does not require that every question of law or fact be common to every member of the class." *Paxton v. Union National Bank*, 688 F.2d 552, 561 (8th Cir.1982), *cert. denied*, 460 U.S. 1083, 103 S.Ct. 1772, 76 L.Ed.2d 345 (1983) (citations omitted). Consequently, "factual variations are not sufficient to deny class treatment to the claims that have a common thread of discrimination." *Id. See also Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986) (class certification proper where plaintiffs represented employees in 49 job categories and alleged discriminatory treatment in compensation, promotion, medical coverage, and training, through overt discrimination, word-of-mouth recruiting, and subjective evaluations). As discussed in detail below, the Court finds that commonality and typicality exist in the instant case despite the inclusion of differing job categories or factual differences among the various manifestations of discrimination alleged by the Plaintiffs.

As a preliminary matter, the Court must briefly address the parties' disagreement over the proper interpretation of the Court of Appeals' instructions regarding the scope of the evidence that this Court may consider in addressing the class certification issue on remand. The Court of Appeals clearly stated that the first question before this Court should be whether the certification back in 1978 was proper.

Hartman, 19 F.3d at 1474. The Court added, however, that

> [e]ven if class certification back in 1978 was premature, it may nonetheless be proper now. The district court would have to ask whether the evidence currently supporting class certification *could only* have been developed as a result of the initial (improper) decision to certify the class. Evidence that *could not* have entered the district court's ken except as a result of class certification should presumably not factor into an *ex post* decision of whether class certification was proper.

Id.

The Plaintiffs contend that this statement refers only to the question of whether the 1978 class certification was proper. With regard to whether class certification is appropriate now, the Plaintiffs assert that this Court may consider evidence not before the Court in 1978, namely, additional affidavits and anecdotal evidence, including information presented by the proposed intervenors. Plaintiffs' Memorandum of Points and Authorities in Support of Class Certification, filed May 26, 1994, at pp. 8-10. In contrast, the Defendant argues that, according to the Court of Appeals, this Court may only examine the record as of the 1978 class certification and the 1979 liability trial in its review on remand of *both* the original class certification back in 1978 *and* the issue of class certification now. Defendant's Amended Memorandum of Points and Authorities in Support of Defendant's Motion to Decertify the Applicant Class, filed June 14, 1994, at pp. 19-22.

The Court of Appeals provided further direction on this issue, however, stating that it "would *not* expect that premature class certification would have undermined any other evidence which *might* support class certification now." *Id.* at 30 (emphasis added). Thus the Court of Appeals anticipated that if this Court finds on remand that class certification was premature in 1978, such a finding would not affect the use of any relevant evidence before the Court on the issue of class certification at this time. The Court of Appeals advised against relying on the 1979 trial statistics, as it "would be uncomfortable in resting on the trial statistics in the present record for a final determination of commonality," and cited cases for comparison in which anecdotal testimony, affidavits, and memoranda concerning an employer's subjective standards for advancement were found to support a determination of commonality. *Id.* at 1473.[8] Finally,

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[8] The Court of Appeals cites to the following cases: *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 617 (5th Cir.1983) ("The statistical proof of channeling . . . and the anecdotal testimony of female . . . employees presented at trial set forth common issues of law and fact"); *Cook v. Boorstin*, 763 F.2d 1462, 1472 (D.C. Cir. 1985) ("Plaintiffs in this case appear to have met the [commonality and typicality] requirement amply by presenting affidavits and memoranda suggesting that the [employer]'s subjective standards for advancement have resulted in systematic discrimination against blacks and other minorities."); *Griffin v. Carlin*, 755 F.2d 1516, 1532 (11th Cir.1985) ("22 named plaintiffs had alleged sufficiently diverse employment practices that the court might infer that discriminatory treatment was typical of defendant's promotion practices and that defendant's promotion practices were motivated by a pervasive policy of racial discrimination"); *Bishop v. New York City Department of Housing Preservation and Development*, 141 F.R.D. 229 (S.D.N.Y.1992) (finding that

the Court of Appeals advised this Court that it "may also consider creating sub-classes, certifying a narrower class, or adding additional class representatives" on remand. *Id.* at 1474.

The only manner in which this Court can give effect to the language of the Court of Appeals would be to consider evidence outside the record as it existed in 1978 and 1979, including the parties' briefs on the certification and intervention issues and the sworn declarations and other materials contained therein. Therefore, in determining whether class certification is proper now, the Court will consider the record as it existed in 1978 and 1979, as well as any additional evidence, including relevant anecdotal testimony, affidavits, and memoranda concerning the Defendant's alleged discriminatory policies that have been submitted to the Court in connection with its reconsideration of class certification on remand.

A. The Record Demonstrates that the Class was Properly Certified in 1978

Pursuant to the Court of Appeals' instructions, this Court shall first address the issue of whether the class was properly certified in 1978. The Court observes at the outset, however, that the seminal question on remand is whether certification of the Plaintiff class is proper now, as the resolution of that issue will dictate the outcome of this Court's determination, notwithstanding any finding with respect to the 1978 class certification.

In April 1978, this Court certified the class. After the 1979 bench trial, the Court modified the class to exclude all clerical employees, and dismissed the

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statistical and anecdotal evidence supported commonality claim).

class retaliation and promotion claims. *Hartman v. Wick*, 600 F.Supp. 361 (D.D.C. 1984). This modification narrowed the class such that it no longer resembled the "across-the-board" class which the Supreme Court declined to affirm in *General Tel. Co. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). *Hartman*, 19 F.3d at 1470. Still, the Court of Appeals characterized the key question to address on remand as whether this Court erred in originally certifying the class of all women who have applied for employment at the USIA and who have been or continue to be adversely affected by the USIA's discriminatory employment practices. *Id.* at 1470-71. In addressing this question, this Court shall consider the original complaint and motions for class certification, along with the evidence presented during the course of the liability trial.

With regard to the propriety of class certification in light of the evidence presented at the 1979 bench trial, the Court finds that the record contained sufficient findings of commonality and typicality to support its decision to certify the modified class. Following the original class certification, four named Plaintiffs were added through intervention, and the Court held evidentiary hearings on liability. At the trial, the Plaintiffs presented evidence of numerous subjective and discriminatory practices utilized to choose among applicants, including the use of overt sexist comments in denying positions to females, preferences for males in full time jobs at the USIA, the subjective application of hiring criteria, unfair testing procedures, active discouragement of females from pursuing jobs at the USIA, concealment of vacancies by hiring officials from qualified females, and the preselection of male candidates for positions

sought by women. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Decertify the Class, filed June 10, 1994, at pp. 10-12.

The Court of Appeals made clear that this Court cannot rely on trial statistics to support its decision to certify the class. The individual representations of the various women who testified at trial, however, constitute anecdotal testimony which sets forth common issues of fact as required by Rule 23(a). Here, these women's allegations that they suffered a common injury, that is, the denial of jobs on the basis of their gender, is sufficient to support a finding of class certification.

In its briefs, the Agency raises various arguments in support of its position that certification of the Plaintiff class in 1978 was not proper, many of which are similar to those raised with regard to whether class certification is proper now. Because the determination of whether class certification was proper in 1978 is not conclusive with respect to the practical outcome of the Court's inquiry on remand, however, the Court shall move on to address the determinative issue of whether class certification is proper now.

B. The Record Demonstrates that Certification of the Class is Proper now

Under the standard enunciated by the Court of Appeals, class certification is proper in the instant case if the Plaintiffs have made a specific presentation of subjective employment practices that cut across the job categories and inflict on class members a common injury. *Hartman*, 19 F.3d at 1472. As the cases cited by the Court of Appeals suggest, such a

showing may be made through trial testimony, affidavits, and anecdotal and statistical evidence. *Id.* at 1473. Moreover, the Court may also consider the proposed intervention of additional class representatives in making this determination.[9] *Id.* at 1474.

The Plaintiffs assert that the USIA pursued a policy of intentional sex discrimination against female applicants for all the jobs at issue in this case. In order to demonstrate that the discriminatory effects of this policy were commonly experienced by applicants for all six jobs at issue, the Plaintiffs identify four major discriminatory practices that cut across all job categories: (1) overt discrimination and express limitations on the employment of women; (2) disparate application of subjective criteria to deny women positions, including biased evaluations of tests and credentials; (3) discouragement of female applicants, including the failure to respond to their applications; and (4) the use of discriminatory recruitment devices, including preselection of men, to avoid hiring qualified women.

The Court finds that, based on the record previously established in this case, along with sworn

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[9] The Defendant argues that, before the Court decides the class certification issue, the Agency is entitled to conduct limited discovery on the accuracy of the Plaintiffs claim that typicality and commonality are present. Defendant's Amended Memorandum of Points and Authorities in Opposition to Plaintiffs' Request to Certify the Applicant Class, filed June 14, 1994, at p. 71. In a teleconference on September 7, 1994, however, counsel for both parties stipulated that the current record is sufficient for the Court to make a determination regarding the propriety of class certification under Rule 23(a). Accordingly, the Defendant shall not be permitted to conduct further discovery on this issue.

declarations of class members, these discriminatory practices have adversely affected female applicants throughout all jobs at issue here. Thus, commonality and typicality are established and class certification under Rule 23(a) is warranted.

(1) THE PLAINTIFFS' SHOWING OF SPECIFIC DISCRIMINATORY PRACTICES COMMON TO THE CLASS SATISFIES THE RULE'S COMMONALITY CRITERION

With regard to each of the four discriminatory practices listed above, the Plaintiffs have provided detailed anecdotal evidence, gleaned from the trial record and additional sworn testimony, which demonstrates that class members suffered from a common policy of discrimination that pervaded all the hiring decisions at issue. The Court has revisited the entire record to examine independently the claims addressed in the Plaintiffs' briefs, and confirm that common issues of law and fact exist to support class certification at this time. The Court concludes that the Plaintiffs have shown a clear pattern of discrimination in hiring practices across all six job categories.

The Court first observes that the Defendant takes great pains to go through the trial record and rebut each class member's claim regarding these discriminatory employment practices. As the Supreme Court has held, however, a district court should not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732 (1974). In other words, the question "is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but

rather whether the requirements of Rule 23 are met." *Id.* As detailed in the Appendices to this Opinion, the record before the Court clearly shows that common issues of law and fact exist among applicants, thereby permitting "the additional inference that class members suffered a common injury." *Hartman*, 19 F.3d at 1472. The Court thus finds at the outset that the Agency's discussion of the merits of the class members' claims is not relevant to the Court's inquiry under Rule 23(a).[10]

(a) The record reveals that class members commonly experienced overt discrimination through the Agency's placement of explicit limitations on the employment of women, and through its employees' expression of stereotypical views of women.

The Plaintiffs persuasively demonstrate that a pattern of overt discrimination and express limitations on the employment of women existed with regard to the USIA's hiring practices. The Plaintiffs have presented the testimony of many class members who allege that they applied for positions but were turned down because, they were told, the Agency had

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[10] The Agency also argues that because the Plaintiffs do not specifically allege a "practice or policy" of discrimination, their claims lack commonality. Defendant's Opposition, at p. 29. However, the Agency misunderstands the relevant inquiry. Commonality may be shown through allegations that the employers' discrimination in hiring practices manifested itself "in the same general fashion." *Falcon*, 457 U.S. 147, 159 n. 15, 102 S.Ct. 2364, 2371 n. 15. Thus each Plaintiff need not allege that the same discrete practice or policy existed. Rather, the individual acts of discrimination cited by the Plaintiffs "could very likely be manifestations of such a policy." *Cox*, 784 F.2d at 1557.

a preference for males in a particular position. Many applicants also describe discriminatory remarks made to them by Agency employees during the application process which evidence inappropriate and stereotypical views of women.

For example, class members were told upon applying for positions that the Agency needed "a balance of voices," that the Agency was seeking males to fill particular positions, that employment might have a negative effect on an applicant's marriage, that there were "enough women in the Foreign Service at mid-level," that men had to be hired first, that hiring a female would incur additional travel expenses for the Agency, that technical jobs were "mainly for men," that a woman's place was "at the stove, not on the air," that it is not good procedure to have too many women, that the Agency was looking for "male voices," that one supervisor did not want "that many girls around," that a broadcaster position was not a good idea for an applicant with small children, and that one applicant should stay home and take care of her baby. *See* Appendix A. The Plaintiffs allege that, as a result of this discrimination, class members were denied jobs in each of the job categories.

Based on the extensive anecdotal evidence proffered by members of the Plaintiff class, including intervenors, the Court finds that a common thread exists of express limits on the hiring of women and the articulation of stereotypical views of women to female applicants, that demonstrates the commonality of law or fact required for Rule 23(a) certification.[11]

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[11] Appendix A contains a detailed discussion of the claims of various women regarding express limits on hiring women and the stereotypical views of women enunciated to applicants

(b) The record reveals that class members were commonly subjected to gender-biased evaluations and discriminatory application of subjective criteria by the Agency.

The Plaintiffs further allege that the USIA subjected women applicants to biased evaluations and used subjective criteria to deny women positions on the basis of their sex. Plaintiffs' Memorandum, at p. 32. Tests were administered in the hiring process for several positions at issue, including Foreign Language Broadcaster/International Radio Broadcaster, Radio Broadcast Technician, and Foreign Service Information Officer/Foreign Service Officer, as well as some Writer/Editor positions. *Id.* The Plaintiffs allege that, throughout the administration of each of the tests implicated here, the Agency's predominantly male selecting officials and test graders undervalued the experience of female applicants, assigned women lower test scores than their performance merited, applied subjective versus objective criteria in evaluating female applicants, and required additional materials and procedures of female applicants than were required of male applicants. *Id.* The Court finds that evidence of the USIA's use of gender-biased evaluations and discriminatory application of subjective criteria further supports the Court's determination that commonality exists

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by Agency representatives. This Appendix, along with Appendix B, was developed through the Court's independent study of the massive record before it, including in particular the information highlighted in the attachments to the numerous briefs submitted by the Plaintiffs and the Defendant Agency on the issue of class certification.

here.[12] Notably, these discriminatory practices cut across both civil service and foreign service positions, thereby addressing what the Court of Appeals considered to be "[t]he principal problem in the certification," that is, the fact "that it encompasses both civil service and foreign service applicants to the USIA, despite the fact that the two categories are hired under different personnel systems." *Hartman v. Duffey*, 19 F.3d at 1471.

For example, the applicants for Foreign Language Broadcaster/International Radio Broadcaster positions who took written and oral tests allege that because the grading did not ensure their anonymity, the graders were afforded the opportunity to use and apply subjective criteria to women's disadvantage. *See* Appendix B (*e.g.*, testimony of Rita Brown). Similarly, applicants for foreign service positions underwent written and oral testing before predominantly male graders who also allegedly used highly subjective criteria in their evaluations and exhibited unfair and hostile views toward female applicants. *Id.* (*e.g.*, testimony of Genevieve E. Huber and Donna L. Woolf). The Court finds that the evidence suggests that applicants to both civil service and foreign service positions were treated in a similarly condescending and inappropriate manner by Agency representatives, a finding which reveals yet another common discriminatory practice justifying class certification at this time.

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[12] Appendix B contains a detailed discussion of the claims of various class members regarding the Agency's use of gender-biased evaluations and discriminatory application of subjective criteria.

At this juncture, the Court recognizes a need to address the Defendant's arguments regarding the nature of the Agency's hiring decision-making authority, as this issue relates to the Court of Appeals' concern over the two job categories. The Court of Appeals observed that foreign service officers must pass a general foreign service entry examination and undergo an oral assessment of their qualifications before they are hired by the USIA. *Id.* In contrast, civil service applicants may apply directly to the Agency in response to vacancy announcements, without taking any preliminary examination. *Id.*

The Agency argues that the diversity of the selecting officials alleged to have discriminated against applicants, and the decentralization of the hiring decision-making authority, undermine class treatment here. Defendant's Memorandum, at p. 37. In particular, the Agency argues that the USIA has virtually no role in the selection process for foreign service officer applicants, and must simply accept foreign service applicants according to their rank-ordered score on the cumulative examination process. *Id.* at 40-41. Thus the USIA further contends that there is no hiring policy or practice that is common to the positions at issue in this suit, and concludes that the Plaintiffs therefore cannot show the existence of a "'common policy of discrimination that pervaded all of the employer's challenged employment decisions.'" *Id.* at 42 (quoting *Hartman*, 19 F.3d at 1472).

The Court agrees with the Defendant's ultimate characterization of the issue at hand, that is, whether the Plaintiffs can show the existence of a common policy of discrimination that pervaded all of the employer's challenged employment decisions, which

include those made with respect to civil service *and* foreign service positions. The Court disagrees, however, with the Defendant's contention that because employment decisions were made by a number of individuals in a number of job categories, the Plaintiffs cannot possibly show commonality. The Court of Appeals explicitly addressed the Plaintiffs' challenge to the USIA's hiring decisions under both the civil service and the foreign service personnel systems and, significantly, found that where the *primary practices* used to discriminate in the different categories are themselves similar, an applicant for one particular position can challenge discriminatory hiring for other job categories. *Hartman*, 19 F.3d at 1471. The Court of Appeals continued:

> In other words, we are unwilling to hold as a matter of law, that a named plaintiff who unsuccessfully applied for one job can never represent an employee who unsuccessfully applied for another job simply because the application process for the second job included a separate and different element. Indeed such a restriction would permit an employer to defeat the broad enforcement of Title VII simply by administering different objective tests as part of the application process for each job . . . The fact that the . . . USIA's hiring of foreign service officers differs in some respects from hiring of civil service officers, does not in itself preclude the named plaintiffs from representing the entire class.

Id. at 1472.

The Court finds that the Plaintiffs have demonstrated that the primary practices allegedly used to

discriminate against women applicants cut across all job categories, including foreign service positions. As Appendices A and B demonstrate, class members who applied for *both* civil service positions and foreign service positions claim to have been subjected to the same or similar discriminatory practices. In addition, because these women were all denied positions with the Defendant as a result of these practices, they all suffered a common injury. The Court finds that this showing meets the commonality requirement of Rule 23(a).

The Court observes that, in addition, the record reveals that the foreign service hiring is in fact controlled by the Agency. *Hartman v. Wick*, 678 F.Supp. at 321-22 ("There is no question that the Board of Examiners, which conducts and evaluates foreign service examinations, is not controlled by the State Department but is an inter-agency board on which USIA officials serve as equal partners."). It is undisputed that the hiring decision-making for foreign service positions is not completely separate from that for civil service positions. Indeed, the Defendant explains that the USIA has consulted with the Board of Examiners for the Foreign Service regarding the types of questions to be included on the written exam, that USIA officials serve as deputy examiners who administer oral assessments to foreign service officer candidates, and that the USIA supplies information to the Board of Examiners regarding the number of foreign service officer positions that it anticipates filling during the next fiscal year. Defendant's Memorandum, at p. 41 n. 15. Thus the Defendant's own explanation of the USIA's role in foreign service hiring belies its equivocal claim that the foreign

service personnel process is "nearly completely separate" from the Agency. *See id.* at 41.

The Court reiterates, however, that the issue here is not the extent to which fusion of the official mechanics of the hiring processes exists, but whether the discriminatory practices alleged by the Plaintiffs cut across both personnel systems. The record demonstrates claims common to applicants for jobs in both civil service and foreign service categories, *i.e.*, that women's applications have been held to higher procedural and substantive standards than those of men, and that any required testing has been administered in a biased fashion. *See* Appendix B (compare statements of foreign service applicants Heilbronn, Huber, and Woolf with those of civil service applicants Berger, Serbu and Hasan). In addition, like class members who were rejected for civil service positions, several foreign service applicants allege that they were faced with express limitations on the employment of women and/or received stereotypical remarks about women when they were applying for foreign service positions. *See* Appendix A (compare statements of foreign service applicants Witt and DeYoung with those of civil service applicants Hartman, Kem and Kreutz). Moreover, women applicants from both job categories allege that Agency employees actively discouraged their applications for particular positions. *See infra* Section II.B.(1)(c) (compare statement of foreign service applicant Witt with those of civil service applicants Kluger, Lind, and Goldman). Accordingly, the Court concludes that the Plaintiffs have successfully established the existence of recurring instances of discriminatory hiring practices that cut across job categories, thereby

permitting the additional inference that the class suffered a common injury.

(c) The Plaintiffs' claims that the Agency discouraged female applicants further support a finding of commonality.

Further, the Plaintiffs identify the discouragement of female applicants for positions at the USIA as an additional category of discrimination that supports their contention that commonality existed across the six job categories. Plaintiffs' Memorandum, at pp. 52-66. The Court first observes that the evidence discussed above and in Appendices A and B regarding the Agency's placement of limitations on the hiring of women, its employees' expression of stereotypical views of women, and its use of gender-biased evaluations and discriminatory application of subjective criteria, alone suffices to demonstrate commonality under Rule 23. However, the Court finds that the trial record and supplemental testimony also contain common allegations regarding an Agency policy of discouraging female applicants. The Court concludes that this practice presents another common issue of fact which further supports a finding that the commonality criterion of Rule 23 is met and that class certification is proper.

The Plaintiffs demonstrate that women across job categories raise common issues of fact regarding discouragement from applying to the Agency. For example, one woman claims she was told she should "not bother applying," and another contends that she was told there were no "appropriate" positions available for a woman applicant where "there were enough women in the Foreign Service at mid-level." Declaration of Myrna Kluger, at ¶ 3 and Declaration of

Shirley Hill Witt, at ¶ 10, respectively. Other women claim that they were told that the boss did not like to have "that many girls around," that one woman's application was thrown away as a "joke," and that they could not be hired without certain experience not demanded of other applicants. Declaration of Kathy Millard, at ¶ 3, Declaration of Jeannine Lind, at ¶ 5, and see Declaration of Lynn Goldman, at ¶ 5, respectively. The Court finds that this evidence of the Agency's alleged discouragement of female applicants further supports the Plaintiffs' claim that commonality is present among class members' claims.

(d) The Plaintiffs' claims that the Agency used discriminatory recruitment devices and preselected men further support a finding of commonality.

The Plaintiffs argue that the USIA also preselected male applicants and intentionally used vacancy announcements to avoid hiring qualified females. The Plaintiffs claim that predominantly male service chiefs used word-of-mouth recruiting to hire males, that the Agency restricted vacancy announcements to the predominantly male workforce, that the Agency would close announcements early, permit males to apply after the posted closing date, or cancel the announcement and later reissue it in order to permit males to apply and to avoid female applicants, and that the Agency would preselect men through unusual qualifications, or decline to select women using unstated qualifications. Plaintiffs' Memorandum, at pp. 58-66.

At the remedial trial, Agency witnesses testified regarding the use of word-of-mouth recruiting by predominantly male chiefs of services and division

heads. They also testified that section chiefs and division heads had substantial input into the design of vacancy announcements, affording them the opportunity to restrict the announcement's "area of consideration" to a predominantly male pool of employees. Moreover, the Court found against the Defendant with respect to named Plaintiff Rose Kobylinski's claims that the Agency preselected males for positions. *Hartman v. Wick*, 600 F.Supp. at 363-65. The Court finds that a sufficiently large number of other class members make similar claims, thereby providing another basis for finding that commonality exists under Rule 23(a).[13]

In sum, the Court concludes that the Plaintiffs have presented ample evidence that common issues of fact exist to support a finding that certification of the Plaintiff class at this time is proper under Rule 23. Moreover, the common discriminatory practices detailed above reveal a common injury, that is, the denial of employment through the Agency's use of discriminatory hiring techniques and stereotypical views of women. The Court shall thus turn to the question of typicality under Rule 23.

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[13] *See, e.g.*, Declaration of Kay Templeton Garvey, at ¶ 5 (repeatedly notified that vacancy announcements had been cancelled then had to reapply when the announcements were readvertised later); Declaration of Lorraine Davis-Quick, at ¶ 14, and Declaration of Linda Coley, at ¶ 4-5 (told that their applications had been lost); and Declaration of Carolyn Turner, at ¶¶ 8-9 (rejected for a position based on qualifications not reflected in the vacancy announcement; told by personnel official that vacancy announcement was open then informed by letter that it had closed before her conversation with personnel official).

(2) THE COURT FINDS THAT THE CLAIMS OF THE REPRESENTATIVE PARTIES, INCLUDING THE INTERVENORS, ARE TYPICAL OF THE CLAIMS OF THE CLASS

In order for class certification to be proper, the claims of the representative parties must be typical of the claims of the class. Fed.R.Civ.P. 23(a). The Supreme Court has indicated that, in employment discrimination class actions, the elements of commonality and typicality "tend to merge." *Falcon*, 457 U.S. at 157 n. 13, 102 S.Ct. at 2370 n. 13. The Court explained, "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the interests of the class members will be fairly and adequately protected in their absence." *Id.* Moreover, "typicality is not destroyed merely by 'factual variations' " between the named Plaintiff's claim and the class she seeks to represent. *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir.1987) (quoting *Rowe v. Bailar*, 26 Fair Empl. Prac. Cas. (BNA) 1145, 1147, 1981 WL 372 (D. D.C. 1981)). Rather, the court must consider "whether [the class representative] suffered injury from a specific discriminatory promotional practice of the employer in the same manner that the members of the proposed class did, and whether [the class representative] and the class members were injured in the same fashion by a general policy of employment discrimination." *Id.* (citations omitted). "The burden of showing typicality is not an onerous one." *Paxton*, 688 F.2d at 562. The Court finds that the claims of class representatives Kem and Hartman, and the claims of the intervenors, are typical of the Plaintiff

class and support a finding that class certification is proper now.

In 1978, Ms. Carolee Brady Hartman filed suit on behalf of herself and all other persons similarly situated. The class was then conditionally certified, and four other women later joined Ms. Hartman as named Plaintiffs in this action. On September 11, 1978, the Court ordered that Ms. Luba Medina, Ms. Rose Kobylinski and Ms. Josefina Martinez be permitted to intervene as named Plaintiffs in this action. Later, on November 9, 1978, the Court ordered consolidation of a separate Title VII action brought by Ms. Medina against the Defendant, and on November 22, 1978, Ms. Toura Kem's separate, individual Title VII action was consolidated with this action. The parties agreed that the trial of this case was to be bifurcated into a "liability" stage and a "relief" stage and that issues of entitlement to specific relief by individual members of the class would be postponed until a later stage in the proceedings.[14] The Court subsequently dismissed Ms. Medina's claim on the merits, *De Medina v. Reinhardt*, 21 Fair Empl. Prac. Cas. (BNA), 1979 WL 39 (D.D.C. 1979), and entered judgment against the Defendant with respect to Ms. Kobylinski's individual claim of discrimination. *Hartman v. Wick*, 600 F.Supp. at 375.

The Court finds that, because only Ms. Kem and Ms. Hartman have active claims against the Agency,

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[14] In *Teamsters*, the Supreme Court explained, "at the initial, 'liability' stage of a pattern-or-practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360, 97 S.Ct. 1843, 1867, 52 L.Ed.2d 396 (1977).

they are the only Plaintiffs whose status as class representative is currently at issue. Further, the Court determines that both Ms. Kem and Ms. Hartman present claims that are typical of the Plaintiff class.[15]

Ms. Kem avers that she sought a position as a Cambodian Broadcaster but was informed that there was "no need to hire another woman on the regular staff." *See* Appendix A. Thus, as is typical of class members, Ms. Kem claims that she was denied a job based on the Agency's express limitations on the employment of women. The Agency's comment dismissing the need to hire women also evidences a practice of discouraging female candidates from applying for positions, another thread of discrimination which is common to, and typical of, class members. She also alleges to have suffered the same injury, that is, the denial of employment based on her sex. Accordingly, she is a proper class representative and the typicality requirement of Rule 23 is met.

Ms. Hartman testified that she applied for a job but was told that there were too many women working on the staff. *See* Appendix A. Thus, like Ms. Kem, Ms. Hartman presents a claim that is typical of those of the class members—discrimination on the basis of sex evidenced through express limitations on the employment of women. In addition, she claims to have

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[15] The Court observes that, although it dismissed Ms. Medina's discrimination claims, she was a proper class representative when the class was modified in 1979. Indeed, in its 1982 memorandum to the Court, the USIA conceded that Ms. Medina "was a proper representative of the class at the time of certification . . . ." *See* Defendant's Memorandum to the Court, filed November 24, 1982.

suffered the same injury, that is, she was denied employment because of her gender.

In *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 403-404, 97 S.Ct. 1891, 1896-97, 52 L.Ed.2d 453 (1977), the Supreme Court reviewed a district court's finding, made "upon abundant evidence[,] that the[] plaintiffs lacked the qualifications to be hired," and held that such plaintiffs were "not eligible to represent a class of persons who did allegedly suffer injury." The Defendant argues that the Court has already concluded that Ms. Hartman was not qualified for the position she sought and that, in turn, this finding conclusively undermines this Court's determination of the typicality issue. Defendant's Memorandum, at p. 47. *See De Medina*, 1979 WL 39, *6 (discussing defense testimony regarding Ms. Hartman's professional experience).

The Court finds, however, that Ms. Hartman was not found "upon abundant evidence" to be unqualified for the position she sought.[16] In fact, unlike the district court in *Rodriguez*, this Court neither heard nor made a final determination on the merits of Ms. Hartman's individual claim. Ms. Hartman's claim, like those of every other class member who applied for a civil service position, is subject to an individual *Teamster* hearing before the Special Master. Rather, in *De Medina*, this Court addressed the issue of "[w]hether the defendant's hiring, promotion and salary practices constitute patterns or practices of

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[16] Indeed, the Plaintiffs observe that the Agency's personnel management specialist actually determined that Plaintiff Hartman was qualified for Writer/Editor positions at the GS-11 and 12 levels, and that these levels are the equivalent of the position she sought. Plaintiffs' Memorandum, at p. 30.

discrimination based on sex in violation of Title VII . . . ." *De Medina*, 1979 WL 39, *2. Accordingly, the Court concludes that *Rodriguez* does not preclude a finding that Ms. Hartman is a proper class representative now.

The Defendant further argues that Ms. Hartman lacks standing to raise issues concerning either gender-biased evaluations and discriminatory application of subjective criteria, or the alleged discouragement of female applicants, because she was not subjected to these employment practices. Defendant's Opposition, at p. 16. The Court finds, however, that just because Ms. Hartman did not experience each and every manifestation of the alleged policy of discrimination does not mean she lacks standing to represent class members on their individual claims. Although "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members," *Rodriguez*, 431 U.S. at 403, 97 S.Ct. at 1896 (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 2930, 41 L.Ed.2d 706 (1974)), the factual variations between Ms. Hartman's claims and those of other class members do not destroy typicality. *Wagner*, 836 F.2d at 591. The Court finds that, because Ms. Hartman shares a common injury with members of the Plaintiff class, namely, she suffered the denial of a position with the Defendant agency as a result of sex discrimination, she is an appropriate class representative.

In response to the Court of Appeals' suggestion that the Court may add additional class representatives in consideration of class certification on remand, the Court further finds that the intervenors' claims are typical of those of class members, and thus

satisfy Rule 23(a). In the Petitioners' Complaint in Intervention, filed April 29, 1994, each woman alleges discrimination on the basis of sex, as evidenced by the Agency's express limitations on the employment of women, its employees' expression of stereotypical views of women, the use of gender-biased evaluations and subjective criteria, the discouragement of female applicants, and/or the use of discriminatory recruitment devices and the preselection of men. Each was denied employment, they allege, based on the Agency's discriminatory policies. Moreover, among the intervenors are applicants for positions in both the civil service and foreign service categories. Accordingly, having considered the intervenors' claims along with those of Ms. Kem and Ms. Hartman, the Court finds that the typicality requirement of Rule 23(a) is clearly and abundantly met.

(3) THE COURT FINDS THAT THE NAMED PLAINTIFFS ADEQUATELY REPRESENT THE CLASS

Finally, Rule 23(a) class certification requires a showing that the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).[17] The Defendant argues that there are many actual and potential conflicts within the

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[17] The Defendant does not dispute that the numerosity requirement of Rule 23(a) is met here. See Defendant's Memorandum, at p. 50 n. 16. The Defendant cautions the Court, however, to be "watchful" of the possibility that the Plaintiffs will be unable to show the existence of a class or that it is numerous. *Id.* The Court has considered the Defendant's warning and finds that there is no issue as to whether the class is so numerous that joinder is impracticable. See Fed.R.Civ.P. 23(a).

class which place the adequacy of representation in jeopardy.[18] Defendant's Memorandum, at p. 50. The Defendant reasons that because there are many foreign service class members competing to fill the 39 foreign service positions the Court set aside, a conflict exists within the class that undermines the adequacy of representation. *Id.* Moreover, the Defendant asserts, if the Court finds that class certification is proper and the case proceeds to the relief stage requiring individual *Teamsters* hearings, there may be conflicts between class members regarding selection for particular positions.

The Court finds no merit to the Defendant's reading of the possible problems with adequacy of representation during the relief phase of this litigation. First, as the Plaintiffs point out, the Defendant failed to raise any argument regarding adequacy of representation on appeal. Having reviewed the Defendant's appellate brief, the Court finds that the Defendant only challenged the Court's findings with respect to the commonality and typicality requirements of Rule 23(a). The Court of Appeals thus framed the questions for remand according to the commonality and typicality criteria. *See Hartman*, 19 F.3d at 1474 ("[t]he question ultimately is whether members of the plaintiff class . . . share a common injury.") Consequently, the Defendant cannot now raise arguments regarding another prong of Rule 23(a), as "all viable arguments [must] be vigorously pursued throughout the proceedings, thereby allowing for earlier decision, rather than permitting parties to pick and choose

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[18] The Agency concedes that it does not challenge the adequacy of the Plaintiffs' counsel. Defendant's Memorandum, at p. 50.

which claims will be presented on appeal and which will be held back until a later time." *Washington Post Co. v. United States Department of Health and Human Services*, 865 F.2d 320, 327 n. 9 (D.C.Cir.1989). *See also Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987).

Second, the Agency offers no legal support for its argument that actual or potential conflicts exist among class members who must compete for the same job, such that adequacy of representation is necessarily defeated. As one court reasoned, "[t]hat absurd proposition would of course doom almost every class action charging discrimination in promotion [or hiring]—a drastic rewrite of the law in this area." *Meiresonne v. Marriott Corporation*, 124 F.R.D. 619, 625 (N.D. Ill. 1989). The fact that there are not enough positions at the Agency to accommodate every class member participating in the remedial phase of the litigation does not show that representation of the class is inadequate. *See Simmons v. City of Kansas City, Kansas*, 129 F.R.D. 178, 180 (D.D. Kan. 1989). Rather, it merely highlights "the inevitable factual variations among named plaintiffs and potential class members." *Id.* at 180. Accordingly, the Court finds that the class representation is adequate for purposes of Rule 23(a).

CONCLUSION

Upon consideration of the parties' briefs filed on the issues of intervention and class certification, the oral arguments of counsel at the September 1, 1994 hearing, the Court of Appeals' instructions in *Hartman v. Wick*, 19 F.3d 1459 (D.C. Cir. 1994), the applicable law, the entire record in this case, and for all of the reasons articulated herein, the Court has deter-

mined that the Petitioners' Motion to Intervene shall be granted and the Defendant's Motion to Decertify the Applicant class shall be denied. The Court finds that the evidence set forth in the current record leads to the conclusion that intervention and certification of the applicant class is proper at this time. The Petitioners are entitled to intervention of right in this matter because they have met all four factors of Rule 24(a): timeliness, interest, practical impairment, and inadequacy of representation. With regard to the class certification issue, the Court finds that the detailed anecdotal evidence set forth in Appendices A and B of this Memorandum Opinion demonstrate that common issues of law and fact exist amongst class members' claims, and that the claims of the original and additional class representatives are typical of those of the Plaintiff class, thereby justifying class certification under Rule 23(a) at this time.

Accordingly, the Petitioners' Motion to Intervene shall be granted and the Defendant's Motion to Decertify shall be denied.

APPENDIX A

ANECDOTAL TESTIMONY DESCRIBING OVERT DISCRIMINATION AND EXPRESS LIMITATIONS ON THE EMPLOYMENT OF WOMEN IN CIVIL SERVICE AND FOREIGN SERVICE POSITIONS

1. *Toura Kem.* Ms. Kem is a named Plaintiff who testified at the 1979 liability trial that she sought a position as a Cambodian Broadcaster, but was told by the Chief of the Cambodian Service in 1969 that there was "no need to hire another woman on the regular staff" despite her long-standing service as a purchase order vendor, or freelance contractor. Kem Testi-

mony, Tr. 5/30/79, at 170. Ms. Kem was not hired for a full-time position, but two males were hired just prior to her leaving the Service in 1976. *Id.* at 174.

2. *Cecilia Kreutz.* Ms. Kreutz, a well-qualified applicant for a broadcaster position, testified in a deposition admitted into evidence at the liability trial that she was told by the Chief of the Polish Service that, "In the radio, as you know by working in radio, you have to have a balance of voices." Deposition Excerpt of Cecilia Kreutz, at 58, Tr. 5/29/79, at 6-10. When Kreutz pressed for clarification, the Chief explained, "[I]f you have too many women, then it's not a very good procedure." *Id.* At the time of her applicant, the Polish Service employed more men than women as broadcasters. *Id.* at 59. She was denied a full-time position as a broadcaster, although a man was hired. *Id.* at 64-65.

3. *Vukosava C. Hodzic.* Ms. Hodzic testified in a deposition admitted into evidence at the liability trial that she applied for a broadcaster position with the Yugoslav Service in 1977 and 1978. Although qualified, the acting Chief of the Yugoslav Service told her the Service was looking for "male voices" and a "female voice" would not be suitable. Declaration of Vukosava C. Hodzic, at ¶ 4. On her third attempt for a full-time position, Ms. Hodzic was brought on not as a full-time employee, but as a purchase order vendor without the attendant salary, benefits and seniority. *Id.* at ¶ 7. She claims she was told by the acting Chief that her broadcast duties would be related to material concerning social issues, entertainment features, and fashion, while the more important issues such as news, politics, and international happenings would be better accepted by the audience if a male announcer read them. *Id.*

4. *Elena Tsypkin.* Ms. Tsypkin is a class members who sought a position as a broadcaster with the Russian Service and passed the requisite test. Upon inquiring about the status of her application, she was told that the Service "needed more male Russian voices." Declaration of Elena Tsypkin, at ¶ 5. She was not hired. *Id.* at ¶ 6.

5. *Marianna R. Serbu.* Ms. Serbu is a class member who sought a position as a broadcaster with the Romanian Service. She claims that the Chief of the Romanian Service told her he would rather hire her husband, that men were preferred for the position, and that "her place as a woman was at the stove, not on the air." Declaration of Marianna R. Serbu, at ¶ 5.

6. *Rita Brown.* Ms. Brown's deposition was admitted into evidence at the liability trial. She was a long-time personnel and administrative officer at the Voice of America ("VOA") who testified that female broadcasters were often not permitted to voice hard news, but were restricted to roles as M.C., although men also filled that role in circumstances where the M.C. position was "more the anchorman in American style." Deposition Excerpt: R. Brown Deposition, at 113-14, Tr. 5/29/79, at 6-10. The M.C. role was otherwise assigned to women "because they needed to show a balance of voices . . . if you had a predominantly male show, you needed to have a woman's voice breaking up the monotony of predominantly male voices." *Id.* at 113-14. Service chiefs justified bringing women on in a purchase order capacity "because you have a predominantly male staff and you want a balance of voices." *Id.* at 115.

7. *Irma Perez Murphy.* Ms. Murphy is a class member who sought a position as an International Radio Broadcaster and was called to the Agency for

an interview. She claims that, during the interview, an Agency official told her that VOA already had enough women in the organization and that they needed a balance of men and women. Declaration of Irma Perez Murphy, at ¶ 3. She was told that they were seeking to fill the position with a man. *Id.*

8. *Kathy Millard.* Ms. Murphy is a class member who sought a position as a Hungarian broadcaster. She claims that, during an interview, an Agency official told her that his supervisor did not want "that many girls around." Declaration of Kathy Millard, at ¶ 3. The official also referred to a very experienced female journalist as "an old broad." *Id.*

9. *Etel Berger.* Ms. Berger testified in her deposition, which was admitted into evidence at the liability trial, that, on numerous occasions, she discussed with the Brazilian Branch Chief the possibility of obtaining a full-time position as a broadcaster in the Brazilian Service. Deposition Excerpt of Etel Berger, at 33-35, Tr. 5/29/79 at 6-10. The Chief told her, "Etel, you have small children. You have responsibilities. I don't think it is a very good idea now." *Id.*

10. *June Drake.* Ms. Drake is a class member who applied for a position as an International Radio Broadcaster (English) with Voice of America. Ms. Drake claims that, after being rejected for the position, she was told that her application would remain active. Declaration of June Drake, at ¶ 2. She later contacted the Agency to inquire about other positions, but was told that "most of the positions were held by males, but infrequently female positions became available also." *Id.* at ¶ 5.

11. *Carolee Brady Hartman.* Ms. Hartman is a named Plaintiff who claims she was interviewed by the Editor of an Agency magazine, Mr. Robert Koren-

gold, in connection with an impending vacancy for a writer on that magazine. At the liability trial, she testified that the Editor told her

> that he had 15 women working on the staff of that magazine and that there were too many women. He said that he wanted to fill the position with a man, because the person who was leaving was a man, and that would mean there would be no men working on the magazine, and that he intended to hire a man for the position. Tr. 5/29/79 at 35.

The Editor conceded at the trial that he told Ms. Hartman about an upcoming vacancy for a writer, which would come open after he left the magazine, and that "[they] were looking for a man to fill it." Tr. 5/31/79 at 185-86.

12. *Kay T. Garvey.* Ms. Garvey was a qualified writer applicant who claims that she was asked whether travel would be a problem since she was married, whether her husband would allow her to travel, and whether she would have a problem working and being married. Declaration of Kay Templeton Garvey, at ¶ 6. She was asked these questions on at least three separate occasions by the male personnel specialist with whom she spoke when she called the Agency to inquire about the status of her applications for this position. She had to reapply on several occasions because the vacancies for which she applied were cancelled and then readvertised later. Garvey Declaration, at ¶¶ 5-6.

13. *Priscilla McPherson.* Ms. McPherson is a class member who sought a position as a Production Specialist. Declaration of Priscilla McPherson, at ¶ 3. She was interviewed by a male USIA official who

stared at her chest and stated, "Well, I'm afraid the men here would have a hard time working with you, given your attributes." *Id.*

14. *Linda Coley.* Ms. Coley is a class member who claims that she applied for three TV Broadcast Technician positions and was not hired for any of them. Declaration of Linda Coley, at ¶ 2. She then applied for the Radio Technician position, but when she checked to ensure that her application materials arrived, she was told the Agency had received them, but they had been lost and she was asked to send in another application. *Id.* at ¶ 4. Then on 6:00 p.m. of the day before the closing date for applications, she was told that the Agency had again lost her work experience form and that she should write her job experience down on a piece of paper and bring it to the Agency that evening. *Id.* at ¶ 5. Her application was ultimately rejected. *Id.* at ¶ 6. Thereafter, she applied for another Radio Technician position when it opened up. *Id.* at ¶ 7. After having been found qualified and placed on the register, she called the Agency regularly to check on her status. *Id.* at ¶ 9. During one call, an Agency official told her that the men had to be hired first and she simply would have to wait her turn. *Id.* Despite her qualifications and the underrepresentation of women in this job category, she was never offered the position. *Id.* at ¶ 10.

15. *Myrna Kluger.* Ms. Kluger contacted the Agency to apply for an Electronic Technician position, but was told that she should not bother applying for the position and that she should stay home and take care of her baby. Declaration of Myrna Kluger, at ¶¶ 2, 3.

16. *Claire Frankel.* Ms. Frankel, a proposed intervenor and class member, sought positions both

as a Radio Broadcast Technician and as an Electronic Technician. Declaration of Claire Frankel, at ¶ 2. After having been found qualified for at least one position, she was called to an interview, during which the interviewer asked her, "Why is a cute girl like you interested in a job like this?" *Id.* at ¶ 6.

17. *Carolyn Turner.* Ms. Turner is a class member and proposed intervenor who unsuccessfully sought a position as a Production Specialist and claims she was told by the Deputy Director for TV & Film that she would not be offered the position, because hiring a female would cause the Agency to incur additional costs of separate lodging for a female producer in the field. Declaration of Carolyn Turner, at ¶ 8. Furthermore, the official specifically told her that despite her qualifications for the position, he was not going to offer it to her because the substantial travel required would harm her marriage. *Id.*

18. *Michal Shekel.* Ms. Shekel is a class member and proposed intervenor who sought employment as an International Radio Broadcaster (English) and Writer. Declaration of Michal Shekel, at ¶ 3. Ms. Shekel claims that a Voice of America interviewer told her that her qualifications were great, but that having a "girl's voice" and a "guy's name" would work against her. *Id.* The interviewer also told her that she was a "very young girl" and needed more experience. *Id.* On her second attempt to apply for a broadcaster position, she was informed that the Agency was looking for "a balance" or employees. *Id.* at ¶ 8. Also, while seeking employment at the Agency, she inquired about technical positions and was told that off-air technical jobs were "mainly for men." *Id.*

19. *Jahanara Hasan.* Ms. Hasan is a class member and proposed intervenor who sought a broadcaster

position in the Bangla Service. Declaration of Jahanara Hasan, at ¶ 2. After she submitted the application, the Section Chief informed her that she should not have applied because they were planning on hiring a man for the position. *Id.* at ¶ 6. Ms. Hasan was also told that women were not considered by management to be able to sustain the strenuous demands of broadcasting as were men, that not having women in full time positions was a problem, and that women needed more leaves of absence than men. *Id.* at ¶ 10. Finally, Ms. Hasan was told that women were not considered by management to be able to sustain the strenuous demands of broadcasting as men could. *Id.* Ms. Hasan was also told that a male translator and broadcaster stated that a woman should not have dared to apply for a broadcasting job and women should be involved only in jobs more suitable for females, such as teaching elementary school. *Id.*

20. *Shirley Hill Witt.* Ms. Witt is a class member and proposed intervenor who claims that she sought a position in the mid-level of the Foreign Service. Declaration of Shirley Hill Witt, at ¶ 6. After successfully completing every portion of the screening, she was rejected because, according to an Agency official, there "were enough women in the Foreign Service at mid-level." *Id.* at ¶ 8; *see also Hartman v. Wick*, 678 F. Supp. at 322.

21. *Patricia DeYoung.* Ms. DeYoung is a proposed intervenor who sought several positions in the Foreign Service/Foreign Affairs areas. Declaration of Patricia DeYoung, at ¶ 2. She claims that she personally appeared at the Personnel Office at the USIA to present applications, but a personnel officer told her that she could not be hired for such positions because only men were being sought. *Id.* at ¶ 5.

APPENDIX B

ANECDOTAL TESTIMONY DESCRIBING DISCRIMINATION IN THE FORM OF GENDER-BIASED EVALUATIONS AND DISCRIMINATORY APPLICATION OF SUBJECTIVE CRITERIA FROM THE RECORD IN 1978, 1979 AND ON REMAND

1. *Donna L. Woolf.* Ms. Woolf is a proposed intervenor who applied unsuccessfully for a lateral transfer into the Foreign Service of the USIA on two separate occasions in 1978 and in 1983. Declaration of Donna L. Woolf, at ¶ 2. Ms. Woolf contends that she had extensive training and work experience abroad in media related jobs both in and out of the USIA. *Id.* at ¶ 3. Ms. Woolf states that, upon applying for mid-level entry into the Foreign Service at USIA in 1978, she was informed that she was not qualified for the position because she lacked a sufficient amount of time at USIA. *Id.* at ¶ 4. Since her failed 1978 application, Ms. Woolf has allegedly learned of several of her colleagues whose applications were accepted despite little or no employment experience with USIA. *Id.*

Ms. Woolf states that she reapplied in 1983 "having accumulated substantially greater diplomatic and linguistic experience since [her] prior application." *Id.* at ¶ 5. Pursuant to her 1983 application, Ms. Woolf was allegedly given an oral examination and an interview in which she "perceived hostility from a male examiner" who was "generally condescending" and asked follow-up questions which were "disdainful and scornful of [her] background and experience." *Id.* at ¶ 6. Ms. Woolf's 1983 application was rejected. *Id.* at ¶ 5. She further states that when she inquired as

to why her 1983 application was rejected, she was told by a male examiner that she had displayed "too much knowledge" with regard to one question. *Id.* ¶ 7. In addition, she was graded poorly for not writing complete sentences on a written portion of her exam which explicitly asked the applicant "to outline" her answer. *Id.* In sum, Ms. Woolf found her application experience "to be frustrating and highly dependant on subjective factors." *Id.* at ¶ 8.

2. *Genevieve E. Huber.* Ms. Huber is a proposed intervenor who claims that she sought a Foreign Service Position at USIA in December of 1974. Declaration of Genevieve E. Huber, at ¶ 4. Ms. Huber asserts that, after passing the written portion of the Foreign Service exam, and during the oral portion of her exam, she was given "obfuscatory instructions delivered in a tone of voice that implied that [she] was intellectually and psychologically inferior." *Id.* at ¶ 5.

3. *Lisa M. Heilbronn.* Ms. Heilbronn is a proposed intervenor who states that she applied for entry into the Foreign Service department of the USIA in 1979. Declaration of Lisa M. Heilbronn, at ¶ 2. After passing the written portion of the Foreign Service Entrance Exam, Ms. Heilbronn's application was submitted to the oral assessment process which consisted of several parts "all of which were quite subjective." *Id.* at ¶ 3. She alleges that, during her interview session, "a male interviewer challenged [her] capacity to be self-reliant in a foreign environment such as a remote post, and he expressed skepticism and refused to accept [her] positive response to his challenge." *Id.* Ms. Heilbronn was not hired by the USIA Foreign Service department.

4. *Robin Yeager.* Ms. Yeager is a proposed intervenor who states that she sat for the Foreign Service Exam several times beginning in 1979. Declaration of Robin Yeager, at ¶ 2. Ms. Yeager alleges that on one occasion when she took the examination, despite previously scoring very well on several standardized tests which tested her verbal ability, she failed the English Expression portion of the exam which resulted in a termination of her application. *Id.* at ¶ 4. Ms. Yeager asserts that when she attempted to ascertain why she did not pass the exam, "no satisfactory explanation was forthcoming." *Id.* at ¶ 5.

On another occasion, after successfully passing the written part of the Foreign Service Exam, Ms. Yeager alleges she participated in the oral portion of the exam after which she felt "particularly proud of [her] performance." *Id.* at ¶ 7. Despite her evaluation of her performance, Ms. Yeager failed her exam. *Id.* at ¶ 9. According to Ms. Yeager, her "failure at the examination cannot be explained through any objective, measurable criteria and could only be explained through the use of subjective, non-measurable criteria." *Id.* at ¶ 11.

On a third occasion, Ms. Yeager was again given the opportunity to take the oral exam at which she again believed she performed well. *Id.* at ¶ 12. According to Ms. Yeager, her interview lasted until past five o'clock p.m. on a Friday. *Id.* Following her interview, she received a letter dated and postmarked on the same Friday notifying her that she had failed her oral exam which indicates that the decision to fail her was made before she had completed the examination process. *Id.*

5. *Joan S. Leopold.* Ms. Leopold is a proposed intervenor who states that she applied for a position

as a Foreign Service Officer with the USIA in 1980. Declaration of Joan S. Leopold, at ¶ 2. Ms. Leopold states that at her oral exam she was asked several "'trick' questions which were not intended to test [her] knowledge." *Id.* Particularly, when she was asked what types of security measures may be necessary for an embassy, Ms. Leopold alleges that she responded that "perhaps some embassies should be equipped with metal detectors" and, according to Ms. Leopold, was "chastised by the interviewer for being overly security conscious." *Id.* ¶P 3. Ms. Leopold believed the question was a "trap" designed "to promote a confrontation." *Id.*

In another portion of the oral exam, Ms. Leopold felt she had performed "extremely well" in a group exercise but "was awarded a barely passing score" because she came across as too aggressive. *Id.* ¶ 4. Finally, Ms. Leopold states that, following the exam, she received a form from her examiners indicating that she was married although she was not asked any questions regarding her marital status during the exam. *Id.* at ¶ 5. She believes that the examiners took note of her wedding ring which she wore to the exam. *Id.* She did not obtain the position for which she had applied.

6. *Toura Kem.* Ms. Kem is a named Plaintiff who testified that she had, on numerous occasions, sought a full-time civil service position with the USIA as a broadcaster after having been employed in the Cambodian Service for a decade as a purchase order vendor. Kem Testimony, Tr. 5/30/79 at 164-70. During her ten-year relationship with the USIA as a purchase order vendor, Ms. Kem had broadcast several times on the air for the Voice of America. *Id.* According to Ms. Kem, after she submitted herself to the USIA's

written and oral testing procedures, she was informed that she had failed. *Id.* at 174.

7. *Etel Berger.* Ms. Berger is a witness who, in a deposition admitted into evidence at the liability trial, states that she sought a position as a civil servant broadcaster in the USIA's Brazilian Service. Deposition Excerpt of Etel Berger, at 41-51. Ms. Berger states that she submitted herself to written and oral testing which was ostensibly anonymous. *Id.* However, in a break in the testing, Ms. Berger states that she was confronted by two male employees who accused her of taking "a job away from a man." *Id.* at 43, 47-51. Despite the experience Ms. Berger had accumulated in the several years she had worked as a purchase order vendor, she contends that she was informed that she had failed the examination. *Id.* at 24-36, 51. After protesting the results of her test, Ms. Berger alleges that she was retested and passed a test governed by more objective procedures. *Id.* at 64-65, 67-70.

8. *Cecilia Kreutz.* Ms. Kreutz is a witness who, in her deposition admitted into evidence at the liability trial, states that she sought a civil service position as a broadcaster with the Polish Service in the USIA. Deposition Excerpt of Cecilia Kreutz, at 37-40. Pursuant to her interest in the broadcasting position, Ms. Kreutz states that she was given written and oral examinations which she failed. *Id.* Because of her extensive experience in broadcasting and her native fluency in Polish, Ms. Kreutz states that she challenged her test results. *Id.* at 45-47. Following her challenge, Ms. Kreutz alleges that she was retested and found to be eligible for employment as a broadcaster. See Attachment 22 to Plaintiff's Memorandum of Points and Authorities in Support of Class

Certification, U.S. Civil Service Commission Certificate of Eligibility.

9. *Marianna Serbu.* Ms. Serbu is a proposed class member who states that she sought a civil service position as a Romanian broadcaster with the USIA in 1979. Declaration of Marianna R. Serbu, at ¶ 6. According to Ms. Serbu, she was given written and oral examinations after which she was notified that she had failed. *Id.* Ms. Serbu states that she had received the equivalent of a B.A. and a M.A. from a Romanian university and had taught French to Romanian university students and Romanian at the Berlitz language school. *Id.* at ¶¶ 2, 3, 7.

Unable to accept her test results, Ms. Serbu contends that she asked to see her exam and how it was graded. *Id.* at ¶ 6. Upon analyzing her exam, she allegedly found that the grader had graded her answers based on a form of Romanian dialect which had been out of use since the 1940's. *Id.* After she pointed this out, Ms. Serbu alleges that the graders agreed to regrade the test and found that she had actually passed, after which she was placed on a waiting list for a foreign language broadcaster position. *Id.*

In 1980, Ms. Serbu contends that she was asked to take another exam to keep her eligibility for a broadcaster's job current. *Id.* at ¶ 7. After her second test, Ms. Serbu states that she was informed that she had failed. *Id.* Ms. Serbu states that she again sought to review the grading procedures used on her exam, however, she was not allowed to review the second exam. *Id.*

10. *Jahanara Hasan.* Ms. Hasan is a proposed intervenor who states that she sought several civil service positions as a Foreign Language Broadcaster in the Bangla Service of the USIA. Declaration of

Jahanara Hasan, at ¶ 2. Ms. Hasan contends that she had strong qualifications for applying for the jobs which she sought. *Id.* at ¶ 3. According to Ms. Hasan, at her oral examination, she was tested by three male evaluators, one of whom was the Chief of the Bangla Service and had expressed hostility specifically towards her and the employment of women in the Bangla Service in general. *Id.* Despite her extensive experience as a professor, writer, and broadcaster for All Pakistan Radio, following her exam, Ms. Hasan states that she was informed that she had failed. *Id.* at ¶ 9. According to Ms. Hasan, the evaluator of program content for the Bangla Service, an official outside of USIA, "expressed great surprise, as did others in the fields of broadcasting and film-making" when they learned that Ms. Hasan failed her language exam. *Id.* at ¶ 10. In addition, when Ms. Hasan protested the results of her exam and asked that it be graded by an outside grader, she alleges the Bangla Service refused to have the test reviewed by an outside grader. *Id.* at ¶ 11.

11. *Rita Brown.* Ms. Brown is a witness who, in a deposition submitted into evidence during the liability trial, testified that the testing procedures employed at USIA were not anonymous. Deposition Excerpt of Rita M. Brown, at 74-77. She also testified that the graders of the exams, as well as those who made the selections of hires, were predominantly male. *Id.* at 71-74.

12. *Jeanne Jackson.* Ms. Jackson, who was head of personnel at Voice of America, is a witness who testified that the foreign language broadcasting tests and evaluation procedures were subjective. Jackson Testimony, Tr. 6/4/79, at 39. Ms. Jackson also testified that the process of evaluating tests was run by a

group the majority of which were males who were selected by male service chiefs. *Id.*

13. *Ellen Shapiro.* Ms. Shapiro is a class member who states that she applied for entry into the Foreign Service department of the USIA in 1979. Declaration of Ellen C. Shapiro, at ¶ 2. After passing the written portion of the Foreign Service exam, Ms. Shapiro states that she took the oral portion of the exam. *Id.* Ms. Shapiro states that "the interview portion of the assessment was performed in a perfunctory manner." *Id.* at ¶ 4. She relates that she was interviewed by one male and one female who asked her questions "in a curt, almost hostile manner and seemed quite uninterested in [her] responses. Their demeanor and reactions suggested that they had already rejected [her] as a candidate even before the interview really got started." *Id.* She was not selected for the position.

14. *Lorraine Davis-Quick.* Ms. Davis-Quick is a class member who has submitted a signed affidavit in which she states that she sought a position as a Radio Broadcast Technician ("RBT") with USIA in June of 1980. Declaration of Lorraine Davis-Quick, at ¶ 8. Ms. Davis-Quick asserts that she and a male colleague together applied for a position as an RBT with the Voice of America at that time. *Id.* According to Ms. Davis-Quick, each completed the requisite forms and submitted their applications within one week of each other. *Id.* At the time, Ms. Davis-Quick believed her qualifications earned in several markets in a wide range of broadcasting capacities were "equal to or better than those" of her male colleague. *Id.* at ¶ 9. According to Ms. Davis-Quick, her male colleague was hired within several weeks after his application. *Id.* at ¶ 10.

Ms. Davis-Quick claims, on the other hand, that she did not receive any notification on her score on Self Appraisal forms for several weeks. *Id.* at ¶ 11. She further asserts that, when she finally did receive notification, Ms. Davis-Quick learned that she had scored in the mid-70's and was informed that this "was 'very good' for a female without military service." *Id.* at ¶ 12. Ms. Davis-Quick states that she continued to make status checks every few months on her application with an administrative officer in the VOA who at one instance was surprised at Ms. Davis-Quick's continued interest given that she had allegedly been told that Ms. Davis-Quick was no longer interested in the position. *Id.* at ¶ 13. Ms. Davis-Quick states that when asked who had said this, the administrative officer could not give the name of the person who had given this information. *Id.*

According to Ms. Davis-Quick, a year after she had filed her original application, her file was lost and she was asked to complete another set of required forms. *Id.* at ¶ 14. In 1980 and 1981, the Agency posted openings for the Radio Broadcast Technician position for which Ms. Davis-Quick had applied, and she was interviewed and offered a position. *Id.* at ¶ 15. However, according to Ms. Davis-Quick her name did not appear on the December 15, 1981, or January 6, 1982 priority lists for RBTs. *Id.* at ¶ 16.

15. *Lynn Goldman.* Ms. Goldman is a claimant who states that she had applied to the Voice of America ("VOA") in April of 1980 for the position of Radio Broadcast Technician ("RBT"). Declaration of Lynn Goldman, at ¶ 3. Ms. Goldman states that her husband also applied to the VOA on the same date. *Id.* At the time of their applications, the work experience and

job-related background of Ms. Goldman and her husband were very similar. *Id.* In August of 1980, Ms. Goldman alleges that Mr. Goldman received notification that he was eligible for hire and was then hired by the VOA as an RBT. *Id.* at ¶ 4. Ms. Goldman further alleges that, while an administrative officer in the VOA "discouraged [her] from further pursuing my application because she told [her] that [she] was not eligible for hire as a Radio Broadcast Technician without on-air experience," Ms. Goldman's husband was hired without any on-air experience. *Id.* at ¶ 5.

Ms. Goldman alleges that she reapplied to the VOA in February of 1982 and received a notice in April of that year which said that she did not receive an acceptable score on her test. *Id.* at ¶ 6. Ms. Goldman compared her score with that of Mr. Goldman who received an acceptable score. *Id.* at ¶¶ 7-9. According to Ms. Goldman, there were several differences in the scoring of similar answers that she and her husband gave on the written portion of the exam. *Id.* at ¶ 9. In addition, Ms. Goldman claims that her husband's rating sheet contained the names of the three individuals who scored his qualifications while her sheet contained no names. *Id.* at ¶ 10. Ms. Goldman contends that, when she checked on her second application, she was informed that she needed to attach an addendum updating her work experience. *Id.* at ¶ 12. When an administrator told her that the addendum would not be read because it was submitted on the wrong form, Ms. Goldman allegedly learned that no such form existed. *Id.*

According to Ms. Goldman, she received a rating in February of 1983 stating that she was eligible for hiring. *Id.* at ¶ 13. However, despite her new rating

she was not offered employment by the VOA. *Id.* at ¶ 15.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1996

No. 95-5030
77cv02019

CAROLEE BRADY HARTMAN
AND ALL OTHER PLAINTIFFS,
APPROX. 50 ADDITIONAL PLAINTIFFS, APPELLEES

v.

JOSEPH DUFFEY, DIRECTOR, U.S. INFORMATION
AGENCY, APPELLANT

[Filed: Oct. 23, 1996]

Before: EDWARDS, Chief Judge; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS and TATEL, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing *In Banc*, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ ROBERT A. BONNER
ROBERT A. BONNER
Deputy Clerk

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1996

No. 95-5030
77cv02019

CAROLEE BRADY HARTMAN
AND ALL OTHER PLAINTIFFS,
APPROX. 50 ADDITIONAL PLAINTIFFS, APPELLEES

v.

JOSEPH DUFFEY, DIRECTOR, U.S. INFORMATION
AGENCY, APPELLANT

[Filed: Oct. 23, 1996]

Before: SILBERMAN, WILLIAMS, and ROGERS, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed September 3, 1996, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ ROBERT A. BONNER
ROBERT A. BONNER
Deputy Clerk

APPENDIX M

Section 2000e-16 of Title 42, United States Code, states as follows:

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers, issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal

employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compen-

sate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

APPENDIX N

Federal Rule of Civil Procedure Rule 23 states as follows:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

> **(1)** the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > **(A)** inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > **(B)** adjudications with respect to individual members of the class which would as

a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action,

the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as

a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

No. 96-1522

(3)
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOSEPH DUFFEY, DIRECTOR,
UNITED STATES INFORMATION AGENCY,
Petitioner,

v.

CAROLEE BRADY HARTMAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1996

No. 96-1522

JOSEPH DUFFEY, DIRECTOR,
UNITED STATES INFORMATION AGENCY,
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CAROLEE BRADY HARTMAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari.

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

This class action, challenging sex-based discrimination in hiring in six major job categories at the United States Information Agency, recently entered its twenty-first year in the courts. So far the litigation has bred three decisions by the Court of Appeals for the District of Columbia Circuit, of which the two most recent are pertinent here. In 1994, the court of appeals first considered the agency's objection to class certification, which was grounded on an

asserted impropriety in fashioning a class comprised of applicants for civil service as well as foreign service positions. App. 208a. At that time, the agency could have pursued, but did not, the argument that class treatment was improper because the named plaintiffs did not adequately exhaust their administrative remedies on behalf of the proposed class members.

The court of appeals ruled in 1994 [1] that it lacked sufficient information to determine whether certification was proper and remanded for more detailed factual findings. App. 242a-245a. The court of appeals cautioned against *sole* reliance upon trial statistics showing hiring disparities to support class certification because the statistics did not distinguish between civil service and foreign service hiring, the heart of the agency's 1994 challenge to class certification. App. 240a-241a, 244a. On remand, the district court then scrupulously adhered to the instructions of the court of appeals, avoided completely any consideration of statistical evidence, found discriminatory practices common to all job categories at issue, and determined both that class certification was proper at the time it was originally granted and that class certification is proper today. App. 246a.

The agency again appealed, leading to the 1996 decision that is the subject of this Petition. In its second appeal on class certification, however, the agency abandoned what had earlier been its central argument—that it was improper to certify a class comprised of both foreign service and civil service applicants. App. 9a. In these circumstances, the

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[1] For ease of this Court in its review of the Petition and Opposition, Respondents will refer to the 1996 ruling of the court of appeals below as the "1996 appeal" and the ruling of the prior panel of the court of appeals as the "1994 appeal."

court of appeals not surprisingly ruled that the district court had not abused its discretion in certifying the class. App. 9a. In so doing, the court noted that a concern it had voiced about statistical evidence in its 1994 decision had dissipated, since that concern had been premised on a supposed distinction between civil service and foreign service positions. App. 8a-9a. With the agency no longer pressing that distinction, the statistics provided additional support for class certification. App. 9a.

In its 1996 appeal, the agency also sought to argue that certain named intervenors, whose intervention had been permitted by the district court pursuant to the court of appeals' suggestion in its 1994 decision, had failed to exhaust their administrative remedies. The court of appeals properly held that the agency waived any argument on exhaustion, because it could have been made at the time of the 1994 appeal and was not. App. 4a-5a. In its request for rehearing below, the agency acknowledged that the court's point was "literally true." Petition for Rehearing and Suggestion for Rehearing *En Banc*, at 13.

The court of appeals in 1996 also upheld the district court's finding that the agency had engaged in class-wide discrimination in hiring. App. 13a. The agency does not seek review of this liability determination and has instead confined its petition to issues of class certification and intervention.

As is evident, there is nothing novel here. Class certification was upheld after the district court had engaged in voluminous fact finding on the certification issue—and after the agency had either abandoned or waived key arguments. Given this background, review by this Court is not warranted.

CORRECTION OF MISSTATEMENTS IN PETITION

Under Supreme Court Rule 15.2, and in discharge of those obligations on Respondents, Respondents are compelled to correct Petitioner's Petition for Writ of Certiorari as the Petition contains several errors of fact and statements of holdings. Additionally, Petitioner has failed to preserve the very issues upon which he seeks review by this Court.

First, despite Petitioner's designation of the first issue—"Whether a class action may be certified in a sex discrimination case *solely* on the basis of statistical evidence of sex hiring disparities in the job categories at issue"—any fair statement of the ruling of the United States Court of Appeals for the District of Columbia Circuit reveals that the court of appeals did not so hold. App. 9a; Pet. Questions Presented (emphasis added). The actual holding of the court of appeals—that the agency did not demonstrate abuse of discretion by the district court on the issue of class certification—has not been appealed, and therefore, Petitioner has failed to preserve any objection to the class certification decision below.

Second, the first question presented by Petitioner further implies that the district court certified the class solely on the basis of statistics. To the contrary, the district court actually disavowed any reliance upon the statistics in determining that the class was and is properly certified. App. 270a. Instead, the district court identified four common practices which cut across the six job categories, practices which served as the basis for class certification. App. 271a-272a.

Third, Petitioner claims error with regard to the court of appeals' determination that the agency

waived objections to class certification where the class contains both civil service and foreign service job categories, the central issue in the agency's 1994 appeal. Pet. 22. In fact, the agency did not raise the issue at all in its 1996 appeal. App. 9a. At the same time, Petitioner concedes his failure to raise this issue before the court of appeals in 1996. Pet. 22.

Fourth, Petitioner has not appealed the court of appeals' affirmance of the district court's decision that class certification was proper in 1978 and 1979. That decision of the district court did not rely, in any respect, upon the granting of intervention. Thus, Petitioner's argument regarding whether he has waived his argument on exhaustion of administrative remedies is moot.

Fifth, Petitioner argues that the 1996 court of appeals' opinion would require Title VII employers to conduct broad, searching discovery of unnamed class members to avoid waiving an employer's right to oppose later intervention. Pet. 24-25. Petitioner has not preserved such an argument as he himself stipulated before the district court that the record was sufficient to decide class certification issues without discovery. App. 272a, n.9.[2]

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[2] Respondent notes that the Petition contains other misstatements, in particular, the representation that the court of appeals in 1996 determined that the number of foreign service officer positions to be set aside for class members (39) was excessive. Pet. 6, n.4. To the contrary, the court of appeals merely ruled that it could not determine how the district court made the calculation and remanded the issue "to the district court to sort out this conundrum." App. 13a-14a. Similarly, in his Statement, Petitioner represents that, in its 1988 remedial opinion, the district court "first narrowed the class to include only women who applied for one of the *specific*

REASONS FOR DENYING THE WRIT

I. NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS CERTIFIED THE CLASS SOLELY ON THE BASIS OF STATISTICAL EVIDENCE.

Petitioner contends the question on appeal is "Whether a class action may be certified in a sex discrimination case *solely* on the basis of statistical evidence of sex hiring disparities in the job categories at issue." Pet. Questions Presented (emphasis added). Petitioner's question is fatally flawed because the district court, in determining the class certification issue and following directions from the previous panel in 1994, simply did not rely upon statistics at all. Rather, the district court scrupulously followed Supreme Court precedent in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), and the 1994 court of appeals' decision in *Hartman* by reviewing the record and identifying four common discriminatory practices which cut across the job categories at issue, without regard to statistics.

As this Court well knows, district courts exercise substantial discretion in the certification and manage-

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six positions at issue in the suit. . . ." Pet. 5 (emphasis added). Rather than specific job titles, the district court ruled that the class consists of women who applied in one of six *job categories*. App. 115a-116a. The importance of this distinction is found, in part, in the Foreign Information Series, a composite series which includes both civil service and foreign service positions. *See* App. 117a. Finally, throughout his Petition (*see, e.g.*, Pet. 20-21), Petitioner does not accurately state the statistical basis for the liability findings in 1984. *See, infra*, n.6.

ment of class actions under Rule 23. *Bermudez v. United States Dep't of Agric.*, 490 F.2d 718, 725 (D.C. Cir.), *cert. denied*, 414 U.S. 1104 (1973). In *Hartman*, the district court on remand in 1994 fully complied with its responsibilities and properly exercised its discretion in affirming certification of the class. On review of class certification decisions, courts of appeals defer to district courts on class certification and overturn only those decisions where a district court has abused that considerable discretion. *Id.* Under the principles of *Falcon*, a district court properly exercises that discretion, for instance, when it certifies a class upon a showing that the class shares claims arising out of employment practices resulting in a common injury. *Falcon*, 457 U.S. at 159 n.15 (1982) ("if [an employer] used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a).")

In *Hartman*, under explicit instructions provided by the court of appeals in its 1994 opinion, the district court carefully reviewed its initial certification decision on the basis of the record that existed at the time, including the claims of the originally named plaintiffs. On this record, the district court found that the plaintiffs had fully established a variety of employment practices affecting the class as a whole—including overtly sexist comments and express preferences for males, subjective application of hiring criteria, unfair testing practices and procedures, active discouragement of females seeking to apply, concealment of vacancies by agency officials from qualified females, and preselection of male applicants,

practices used by the USIA without regard to job category and reflecting no differences whether the position was in the civil or foreign service. App. 269a-270a. The district court concluded that initial certification of the class was correct both with respect to commonality and typicality. App. 269a.

Thereafter, also in compliance with the court of appeals' direction, the district court found further that certification today was proper based on the record before it, including the additional evidence proffered by numerous class members, including the twenty intervenors. App. 271a-291a. On that elaborate and factually rich record, the district court detailed four specific employment practices, cutting across all job categories (including the foreign service) which practices served as discriminatory mechanisms against the class as a whole and resulting in a common injury. Specifically, the district court found:

> (1) overt discrimination and express limitations on the employment of women;
>
> (2) disparate application of subjective criteria to deny women positions, including biased evaluations of tests and credentials;
>
> (3) discouragement of female applicants, including the failure to respond to their applications; and
>
> (4) the use of discriminatory recruitment devices, including preselection of men, to avoid hiring qualified women.

App. 271a. Having identified the common discriminatory practices, the district court took great pains to detail its findings of each discriminatory practice through express reliance upon specific allegations

raised by named plaintiffs, trial witnesses, and other class members to show that the discriminatory practices were universally employed, without regard to the job category to which women applied. App. 272a-292a. The district court expressly found commonality between and among the members of the class, including the named plaintiffs, as to the practices from which they suffered. App. 272a-292a.

For instance, the district court reviewed evidence from women claiming that the USIA used biased evaluations and subjective criteria to discriminate on the basis of gender. In the words of the district court:

> Tests were administered in the hiring process for several positions at issue, including Foreign Language Broadcaster/International Radio Broadcaster, Radio Broadcast Technician, and Foreign Service Information Officer/Foreign Service Officer, as well as some Writer/Editor positions. The Plaintiffs allege that, throughout the administration of each of the tests implicated here, the Agency's predominantly male selecting officials and test graders undervalued the experience of female applicants, assigned women lower test scores than their performance merited, applied subjective versus objective criteria in evaluating female applicants, and required additional materials and procedures of female applicants than were required of male applicants. The Court finds that evidence of the USIA's use of gender-biased evaluations and discriminatory application of subjective criteria further supports the Court's determination that commonality exists here. Notably, these discriminatory practices cut across both civil service and foreign service positions, thereby addressing what the Court of Ap-

> peals considered to be "[t]he principal problem in the certification," that is, the fact "that it encompasses both civil service and foreign service applicants to the USIA, despite the fact that the two categories are hired under different personnel systems." *Hartman v. Duffey*, 19 F.3d at 1471.

App. 275a-276a (additional citations and footnotes omitted).

Similarly, the district court found that members of the class, including named plaintiffs, class members, and intervenors, were subjected to overt discrimination and express limitations on the employment of women, although with various manifestations. For instance, one female applicant was rejected because in the view of an agency official there were "enough women in the Foreign Service at mid-level." One was told that certain jobs were "mainly for men." Another was informed that the supervisor did not want "that many girls around." Still another was told that hiring her would hurt her marriage. One female applicant was counseled that she should stay at home and take care of her baby. A woman seeking a full-time professional position as a broadcaster was told that such a move was not a good idea for a woman with small children. Similarly, other female applicants were informed that the agency was seeking males for particular positions. App. 274a. On the basis of these allegations, the district court found "that a common thread exists of express limits on the hiring of women and the articulation of stereotypical views of women to female applicants" sufficient to support a finding of commonality of law or fact under Rule 23(a). App. 274a.

With respect to each of the other discriminatory practices, the district court proceeded in the same

fashion, carefully supporting its finding that each practice had been articulated and shared by class members, including named plaintiffs, in a similar manner, thereby supporting the district court's conclusion that the class suffered from a common injury. App. 283a. The district court concluded:

> The Court finds the Plaintiffs have demonstrated that the primary practices allegedly used to discriminate against women applicants cut across all job categories, including foreign service positions. As Appendices A and B demonstrate, class members who applied for **both** civil service positions and foreign service positions claim to have been subjected to the same or similar discriminatory practices. In addition, because these women were all denied positions with the Defendant as a result of these practices, they all suffered a common injury. The Court finds that this showing meets the commonality requirement of Rule 23(a).

App. 278a-279a; *see also* 282a-283a. Finally, the district court, mindful of the holdings of *Falcon* and *East Texas Motor Freight*, found that certification of this class fully met each and every requirement expressed or endorsed by this Court.[8] App. 291a-292a.

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[8] This holding of course, disposes of any "tension" alleged by Petitioner between the court of appeals' holding in *Hartman* and the holdings of other courts. Petitioner relies upon *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269 (8th Cir. 1990), suggesting that the *Hartman* class resembles, in some regard, the *Chaffin* class. Petitioner's own statement of *Chaffin* compared to the class in *Hartman* demonstrates the lack of "tension." Pet. 15, n.7. According to Petitioner, the individual plaintiff in *Chaffin* "could point to only one or two black employees who might have been discriminated against in promotions, and otherwise relied on statistical evidence,

In its sixty-four page opinion, then, the district court meticulously and carefully followed the instructions of the 1994 court of appeals and its responsibilities under Rule 23 and found that the *Hartman* class easily met the requirements for class certification without reliance upon statistics. Moreover, conscious of the distinction argued by the USIA during the 1994 appeal, the district court thoroughly addressed the issue of whether the discriminatory practices alleged by the class cut across all job categories, including the foreign service. *See, e.g.*, App. 272a, 274a, 275a, 276a, 280a, 281a.

Petitioner appealed the district court's factually intense opinion, an appeal claiming that the district court relied solely upon "anecdotal evidence" and that such reliance was improper under the principles of *Falcon* to show commonality under Rule 23. Faced with a district court opinion which repeatedly stressed, with detailed findings, the commonality of discriminatory practices across civil and foreign service hiring systems, the USIA abandoned all objections to class certification arising from any apparent differences in hiring systems, the engine that had driven USIA's prior appeal resulting in the 1994 remand. App. 8a-9a.

Contrary to the arguments raised in the Petition, the 1996 court of appeals' holding fully comports with the court's authority to review class certification deci-

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which the district court found to be 'bareboned.'" Pet. 15, n.7. Far from a lone named plaintiff with only one or two persons possibly affected, *Hartman* is comprised of more than 1,100 female applicants, asserting four common discriminatory practices, a number not including the more than 9,000 women who participated in the foreign service relief process. App. 214a.

sions. As explained by the 1994 panel, the standard of review of a class certification decision is narrow:

> A district court exercises broad discretion in deciding whether to permit a case to proceed as a class action. *Bermudez v. United States Dep't of Agric.*, 490 F.2d 718, 725 (D.C. Cir.), *cert. denied*, 414 U.S. 1104, 94 S.Ct. 737, 38 L.Ed.2d 559 (1973). In light of the fact that trial courts have the primary responsibility of ensuring the "orderly management of litigation" and that the purpose of class actions lies in "advanc[ing] the efficiency and economy of multi-party litigation," trial courts "are uniquely well situated to make class certification decisions." *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984) (citations omitted). As a result, we review a class certification decision conservatively only to ensure against abuse of discretion or erroneous application of legal criteria. *Wagner*, 836 F.2d at 586.

App. 234a-235a.

Rejecting Petitioner's objections to class certification as insufficient to demonstrate abuse of discretion, the 1996 court of appeals panel, led by Judge Stephen F. Williams, joined unanimously by Judge Laurence H. Silberman and Judge Judith W. Rogers, affirmed the district court's certification of the class, both initially and currently. App. 9a. The court of appeals found that it need not resolve Petitioner's claim that the showing of commonality and typicality before the district court constituted "merely anecdotal evidence" because, in light of the standard of review, even if the panel were to agree wholly with Petitioner's characterization, such argument is insufficient to show abuse of discretion on the part of the district court. App. 9a, *citing Wagner v. Taylor*, 836 F.2d

566, 578 (D.C. Cir. 1987). *See also Wagner v. Taylor*, 836 F.2d 578, 586 (D.C. Cir. 1987); *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984) ("This deferential standard means that an appellate court may well affirm a district court's decision with respect to class certification *vel non* even though the appellate court would have ruled differently in the first instance.").

Specifically, the court of appeals held:

> Although the latest district court opinion understandably spent considerable time showing that the claimed discriminatory practices cut across both civil and foreign service categories, see, e.g., 158 F.R.D. at 536-37, 541, 546, the USIA has not, so far as class certification is concerned, addressed the civil service/foreign service difficulty at all on this appeal. So that issue is out of the case.
>
> There remains the general question whether plaintiffs showed sufficient commonality and typicality among the members of the plaintiff class. Under our prior instructions, the district court—as we noted above—identified four "practices" evidencing a common policy of discrimination that largely cut across job categories. 158 F.R.D. at 539. The defendant argues that these supposed "practices" amount simply to anecdotal evidence of subjective discrimination. We need not resolve that claim, however, for **even if we resolved it in the defendant's favor we would not find an abuse of discretion in the class certification.** *Wagner v. Taylor*, 836 F.2d 566, 578 (D.C. Cir. 1987) (reviewing for abuse of discretion).[4]

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[4] Critically, Petitioner asserts no error with regard to the court of appeals' holding on abuse of discretion on either initial certification or current certification.

App. 8a-9a (emphasis added). Thus, the court of appeals properly held that, given the deference afforded to the district court, and in the absence of a showing of abuse of discretion, the court could not overturn the decision even were the appellate court to disagree factually with the district court. Fatal to the Petition, at no point did the court of appeals hold that it was affirming class certification *solely* on the basis of statistics.

Notably, however, only after having found no abuse of discretion in the district court's certification decision, the court of appeals recognized, with understandable consternation, that the USIA had wholly abandoned its prior objections to class certification, centering on the certification of a class comprised of both civil and foreign service applicants, an objection which resulted in significant additional delay in this now two-decade old litigation. App. 9a. With the USIA's abandonment of that issue, and thus any objection to the use of statistics encompassing both hiring systems,[5] the court of appeals went on to note that there was no barrier to additionally considering those statistics to support class certification.[6] App. 9a.

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[5] Petitioner openly concedes that he has failed to raise this point while at the same time faulting the court of appeals for failing to preserve it for him. Pet. 22.

[6] In its 1984 liability opinion, the district court carefully analyzed the statistics offered by both parties. App. 94a-109a. Briefly summarized, the parties each offered expert labor economists who, *inter alia*, performed relevant labor market analyses of the agency's workforce with reference to these six occupations in the census data. In four of the six categories, the experts *agreed* that the agency underutilized women to a statistically significant degree regardless of whether the comparisons were made between the incumbent workforce

Since the court of appeals' opinion rests on a proper application of legal principles to the issue before it and does not rely solely upon statistics to affirm the district court's certification order, the decision at issue does not run afoul of this Court's holding in *Falcon*, as asserted by Petitioner.[7] Moreover, the court of appeals' consideration of statistics in aid of the class certification decision it had already affirmed does not give rise to error.[8] As the previous panel had held, "statistics can generally be probative of the question of commonality." App. 241a-242a, *citing, e.g., Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 617 (5th Cir. 1983) (anecdotal testimony and statistics show common issues of law and fact); *Bishop v. New York City Dep't of Housing Preservation and Development*, 141 F.R.D. 229 (S.D.N.Y. 1992) (same). The court of appeals, then, in addition to finding no abuse of discretion, could properly point to statistical evidence as an additional ground for class certification.

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and the relevant labor market or the agency's hiring of females compared to the relevant labor market. In the remaining two categories, the experts' disagreement centered around the cross-mapping choices made by each expert. The district court adopted the cross-mapping recommended by the plaintiffs' expert. App. 101a-102a.

[7] Significantly, as the 1994 court of appeals panel noted, the *Hartman* class action is not an "across-the-board" case (App. 234a), nor is the class comprised of promotion claims combined with hiring claims, a significant concern to this Court in *Falcon*. App. 236a.

[8] Petitioner cites to no authority for the proposition that class certification cannot, in any event, be supported by a statistical presentation in addition to other evidence.

In sum, the court of appeals did not expressly, or by implication, hold that this class action or any other may be certified *solely* on the basis of statistics. The court of appeals simply made no such broad pronouncements about the use of statistics, despite Petitioner's implications to the contrary. In fact, since the decision regarding the use of statistics is based, in significant part, on waiver, the opinion is heavily fact-dependent and has limited applicability beyond the precise reaches of this litigation. Petitioner's argument simply falls. As a result, neither the federal courts in the District of Columbia nor elsewhere stand in any danger of being overrun with impermissibly certified class actions.

On his first issue, then, Petitioner has failed to appeal any error, to preserve any issue with regard to the ruling actually made by the court of appeals, to assert any conflict with prior opinions of this Court or of the courts of appeals, or to offer any other basis mandating review by this Court.[9]

II. PETITIONER WAIVED HIS EXHAUSTION ARGUMENT BY FAILING TO RAISE THIS ISSUE IN HIS FIRST APPEAL.

Petitioner's second issue concerning exhaustion of administrative remedies suffers from similar defects as his first issue and is, therefore, unworthy of review by this Court. First, Petitioner does not ad-

[9] Importantly, the predicate for Petitioner's argument that review of this Court is necessary since the court of appeals' rulings "are so unprecedented that we cannot point to a conflict with decisions of other circuits" (Pet. 14-15) may be wholly explained by Petitioner's misstatement of the court of appeals' holding, rather than by any departure from existing precedent.

dress the holding of the court of appeals squarely since the record fully establishes Petitioner's waiver of this issue. Second, this case presents no issues of great importance to class action litigation, since the 1996 court of appeals' opinion rests upon a narrow principle of waiver. Finally, where Petitioner failed to appeal the ruling by the court of appeals affirming initial class certification, which decision was made without regard to intervention, Petitioner cannot reach the issue of exhaustion of administrative remedies with regard to those intervenors.

a. Petitioner seeks review of the court of appeals' determination that he waived any appeal arising from exhaustion of administrative remedies by class member-intervenors by failing to raise the issue in his prior attack on class certification in 1994 when the issue was fully developed. As pressed before the court of appeals in 1996, "the USIA disputes the district court's application of the vicarious exhaustion doctrine, claiming among other things that the few administrative complaints actually filed were not precise enough to fulfill the purposes of the doctrine, such as putting the agency on notice and allowing for administrative resolution of the claims." App. 4a-5a. In its rejection of the agency's position on the grounds of waiver, the court of appeals reviewed the record as it stood prior to the agency's 1994 appeal in conjunction with the agency's 1996 appeal and held:

> The USIA had ample opportunity to raise the exhaustion issue on its previous appeal when it challenged class certification. Its theory here depends simply on the absence of individual exhaustion and on the vagueness of the adminis-

> trative complaints of those who did exhaust. As the vast majority of the members of the class have not exhausted their administrative remedies (and in fact the intervenors are and *have always been members of the class*), the filing of petitions for intervention as named plaintiffs did nothing to enhance defendant's ability to raise the issue of exhaustion by plaintiffs who in fact failed to exhaust their remedies personally.

App. 5a (emphasis added).

The court of appeals was exactly correct. In its brief on the 1996 appeal, the agency argued that the administrative complaints filed by originally named plaintiffs failed to serve the function expressed in *Foster v. Gueroy*, 655 F.2d 1319 (D.C. Cir. 1981), that is, to put the employer on notice of the wrongdoing and to permit possible conciliation on a class basis. Petitioner's central point was, however, that "vicarious exhaustion was effectively impossible with regard to *many claims*," an argument focusing on the initial administrative complaints of the originally named plaintiffs viewed from the perspective of the entire class, not just the intervenor-classmembers. Brief for Appellant (1996 appeal), 24, 21-27 (emphasis added).[10]

Petitioner does not address his failure to raise the exhaustion issue in his 1994 appeal because the record does not support his position. Prior to the agency's 1994 appeal, a broad-based attack on nearly every

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[10] As observed by the court of appeals in 1996, Petitioner was well aware of the exhaustion of administrative remedies issue since he himself had raised it much earlier with regard to another plaintiff in the 1982 appeal. *DeMedina v. Reinhardt*, 686 F.2d 997, 1012-1013 (D.C. Cir. 1982) (App. 35a).

aspect of class certification, Petitioner could have asserted, for example, that the administrative processes of named plaintiff Carolee Brady Hartman and named plaintiff Toura Kem were insufficient to provide notice to the employer of the class-nature of the claims so as to permit early resolution of the dispute. By the time of the original certification, and long before the narrowing of the class through the 1984 liability decision and again in the 1988 remedial decision, the processing of both Ms. Hartman's complaint and Ms. Kem's complaint was complete.[11] In fact, Petitioner had full knowledge of the allegations in those complaints prior to the liability trial in 1979 and their use as the predicate to exhaust the administrative remedies on behalf of the class they represented.[12]

Prior to and during the 1987 remedial trial, Petitioner himself hotly contested the administrative claim of Ms. Kem in particular. In that remedial proceeding, Petitioner had specifically asserted, among other things, that Ms. Kem's administrative

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[11] Ms. Kem's administrative complaint, filed in 1974, served as the basis for determining the opening date of the class, a decision made by the district court in 1988, years prior to Petitioner's 1994 appeal. App. 127a-133a.

[12] Following the remedial trial and notice to the class in 1988, the identities of the class members were known to the Petitioner as well as the nature and extent of their claims. Claim forms were served on Petitioner during 1989 and his individual responses to those claims (through Petitioner's sworn declarations addressed to each and every one), under the guidance of the Order of Reference (entered September 30, 1991), were forthcoming prior to his filing of the appeal that resulted in the 1994 appellate decision.

charge was insufficient to notify the employer of the class nature of the claim and whether, at the time of consolidation of Ms. Kem's suit into the class suit, her claim "raised substantive issues different from those raised by Ms. Hartman's case." App. 133a. Rejecting Petitioner's concerns regarding the use of Ms. Kem's 1974 administrative complaint to establish the opening date for the class, the district court found in its remedial opinion:

> [Petitioner] is wrong to allege that Ms. Kem's charge provided no notice of the possibility that defendant might face a class suit. By explicitly calling her charge a claim of discrimination "against females" at USIA, Def. Ex. 93, Part III, and not just on her own behalf, Ms. Kem surely informed [Petitioner] that a class suit might follow. Indeed, she may actually have come as close to filing a class administrative claim as was then possible. Thus, the contention that Ms. Kem's claim cannot be the administrative predicate for this class lawsuit cannot stand.

App. 131a. Notably the district court relied upon, among other authorities, *Foster v. Gueory*, the self-same authority on which Petitioner here relies. App. 130a. Although without doubt Petitioner had each and every tool at his disposal necessary to perfect an appeal in 1994 based upon Ms. Kem's charge, Petitioner did not appeal the district court's findings with regard to Ms. Kem's administrative charge, in any respect, during his 1994 assault on class certification.

As with Ms. Kem's administrative complaint, Ms. Hartman's complaint was fully developed well prior to even the district court's 1984 liability opinion, and Petitioner was obligated to appeal the applicability

and utility of Ms. Hartman's complaint, on penalty of waiver. Nevertheless, despite his broad-based attack on class certification, resulting in the 1994 court of appeals' opinion, Petitioner neither noted nor argued the nature, scope, or sufficiency of either Ms. Kem's or Ms. Hartman's administrative charge (or both) to exhaust administrative remedies on behalf of the entire class.

On this record, then, Petitioner has no grounds to argue that he has not waived the exhaustion issue with regard to every member of the class. Petitioner had his opportunity, as the court of appeals held, and simply did not raise the issue. App. 5a.

In his Petition, however, Petitioner frames his designated issue solely with regard to the post-remand intervenors and asserts he lacked notice of their claims. Pet. Questions Presented. This ground falls as well since, as noted earlier, Petitioner knew, prior to the 1994 appeal, the identity and claims of each and every class member.

This Court has previously held that the requirement of exhaustion of administrative remedies in a Title VII case is not jurisdictional, and is therefore subject to waiver. *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982). Where, as here, a petitioner fails to discharge his duty to appeal at the earliest practicable juncture a fully developed issue, he waives that issue. *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990); *see also Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740 (D.C. Cir.), *cert. denied*, 116 S.Ct. 180 (1995); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d

1071 (D.C. Cir. 1984) (per curiam), *cert. denied*, 469 U.S. 1181 (1985).

In sum, Petitioner has failed to preserve this issue, and where the record not only does not support Petitioner's position, but rather actively undermines it, review by this Court is particularly inappropriate. Moreover, where the holding of the court of appeals rests on waiver, and thus on strategic decisions of the litigants, the decision has narrow application and is heavily fact-bound. As a result, no broad class action management issues are implicated, except perhaps to counsel litigants that issues must be promptly pursued and those left fallow will not be revived to rescue them from the effects of their strategic decisions.[13]

b. Petitioner also attempts to assert that without review of this Court the opinion of the court of appeals imperils the requirement of exhaustion of administrative remedies under Title VII, effectively overturning class action law. Pet. 23-24. No such threat arises, or could arise, from the decision of the court of appeals since the opinion turns wholly on the issue of waiver, that is, whether *this litigant* had an opportunity to raise an issue in a prior appeal and simply failed to do so. App. 5a. Far from broadly implicating class litigation, this issue is heavily dependent upon factual issues and turns on strategic decisions made by one party to the litigation. Since

[13] Although Petitioner offers the specter of wholesale discovery from unnamed class members as yet another basis for this Court's granting of his Petition, no such effects could flow from the court of appeals' decision since Petitioner himself *stipulated* that no discovery was necessary for the district court to address class certification issues. App. 271a, n.9.

the decision has only narrow application to the record before the court of appeals, the decision contains no broad implications for class action case law generally.

Additionally, however, there is a significant question of whether the issue of exhaustion of administrative remedies by class member-intervenors is simply academic and of no particular moment to class certification. Since a district court, considering the issue of class certification, may rely on evidence from class members and is not restricted to evidence from intervenors and named plaintiffs, the issue of whether the intervenors had or had not exhausted administrative remedies does not affect that district court's class certification decision. Petitioner has not appealed the court of appeals' affirmance of the initial class certification (decided without the evidence provided by intervenors), and the affirmance of current certification of the class does not depend upon the granting of intervention of additional named plaintiffs. The issue of exhaustion, then, has no practical effect on the progress of the litigation. As a result, Petitioner's exhaustion issue is simply moot.

In conclusion, Petitioner has not established any conflict of law between and among the courts of appeals as a basis for his Petition. Nor has Petitioner demonstrated any departure from the accepted and usual course of judicial proceedings requiring the exercise of supervisory authority of this Court. Finally, Petitioner has not established any compelling issue with broad implication for class action suits. In fact, none of the arguments pressed by Petitioner serve as a compelling reason for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH DUFFEY, DIRECTOR,
UNITED STATES INFORMATION AGENCY, PETITIONER

v.

CAROLEE BRADY HARTMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondents argue that the court of appeals did not rely on statistical evidence alone in concluding that the class action in this case was properly certified, and that the court of appeals merely applied well-settled standards of review in approving the class certification based on the evidence that the district court had considered. Br. in Opp. 14-15. That argument, however, cannot withstand careful examination of the court of appeals' decision.

The district court did not rely on statistical evidence *at all* when, on the second remand, it concluded that the class was properly certified. See Pet. App. 270a ("The Court of Appeals made clear that this Court cannot rely on trial statistics to support its

decision to certify the class."). Rather, it relied on "anecdotal testimony" introduced at trial (*ibid.*) and also on declarations by the new, post-remand intervenors (*id.* at 271a-272a) to conclude that the prerequisites of commonality and typicality were satisfied. On appeal, petitioner, the Director of the United States Information Agency (USIA), challenged the basis for the district court's class certification, contending that, while the anecdotal evidence relied on by the district court might be probative of individual cases of discrimination, it did not suggest a policy of discrimination common to all class members. See Gov't C.A. Br. 16-21. As the district court did not consider statistical evidence in its certification decision, USIA did not discuss that evidence in the section of its brief challenging certification. Nor did respondents defend the certification decision on appeal based on the statistical evidence as an alternative ground.

The court of appeals assumed *arguendo* that USIA's challenge to the evidence actually relied on by the district court was meritorious—*i.e.*, that the anecdotal evidence was *not* sufficient to support class certification. The court concluded nonetheless that the certification should not be overturned because the *other* evidence in the record—the statistical evidence introduced at trial—was sufficient to support certification, even though the district court had never analyzed or relied on those statistics for the purpose of certification, and had expressly stated that it would not use them for that purpose.[1] After the court of

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[1] The district court had previously certified the class in 1978, without considering statistical evidence at all. Pet. App. 15a-16a. The district court subsequently used statistical evidence to *narrow* the plaintiff class, after finding that women

appeals noted that USIA had argued that the anecdotal evidence relied on by the district court was insufficient, the court of appeals stated that "even if we resolved [USIA's challenge to the anecdotal evidence relied on by the district court] in the defendant's favor we would not find an abuse of discretion in the class certification." Pet. App. 9a. It then explained *why* there would be no abuse of discretion: the statistical evidence never relied on by the district court remained. *Ibid.*

The court of appeals' treatment of this issue cannot be defended as a commonplace application of the abuse-of-discretion standard of review. The court of appeals did not state that it would uphold the district court's decision even though it might have come to a different conclusion about the same evidence, as respondents suggest (Br. in Opp. 14). Rather, the court of appeals upheld the result, the certification, based on evidence that was completely dehors the district court's analysis on that issue.[2] At a minimum, once the court of appeals came to the novel conclusion that the statistical evidence alone might be sufficient to support class certification, it should have remanded the case

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were overrepresented in USIA clerical positions. *Id.* at 25a-26a. As to non-clerical positions, the district court initially found the statistical evidence presented by both sides to be unhelpful. *Id.* at 26a-27a. Thus, at no earlier point in the case did the district court rely on statistical evidence to support its class certification decision.

[2] Thus, this case is unlike either *Wagner* v. *Taylor*, 836 F.2d 578 (D.C. Cir. 1987), or *McCarthy* v. *Kleindienst*, 741 F.2d 1406 (D.C. Cir. 1984), on which respondents reply (Br. in Opp. 14). In those cases, the court of appeals affirmed the denial of class certification by the district court after reviewing the evidence considered by the lower court.

to the district court for analysis of that evidence under the standards of Federal Rule of Civil Procedure 23(a), rather than evaluating that evidence itself, without the benefit of briefing or a lower court decision.[3] See *Hormel* v. *Helvering*, 312 U.S. 552, 556-560 (1941).

Properly read, the court of appeals' decision makes clear that it relied on trial statistics alone to support the certification. The court first noted that, in its previous decision, it had "hesitated to suggest that the certification finding might be based on statistical evidence alone," Pet. App. 9a, and it then explained that it no longer had any such qualms, *ibid.* Respondents suggest that the court of appeals found it proper to rely on the trial statistics to uphold the certification because USIA had not, on its second appeal, specifically challenged those statistics on the ground that they conflated figures for civil-service and foreign-service positions. Br. in Opp. 9. Even if that explanation does partially illuminate the process by which the court of appeals reached its result, it demonstrates that the court of appeals made another,

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[3] Respondents state that USIA "asserts no error with regard to the court of appeals' holding on abuse of discretion." Br. in Opp. 14 n.4. We do not, of course, contest that the appropriate standard of review of class certification decisions is abuse of discretion. Our point, rather, is that the court of appeals never considered whether the district court had abused its discretion based on the evidence that was the predicate for the district court's analysis, because the court of appeals upheld the certification decision on a completely different evidentiary ground. Indeed, the court of appeals was willing to assume that the district court had committed error in basing certification on the evidence that it actually relied on, for it assumed *arguendo* that USIA's challenge to that evidence had merit. Pet. App. 9a.

serious error: the court of appeals failed to give USIA any opportunity to contest the relevance of the statistics to class certification. USIA had not discussed the statistics with respect to the certification decision because those statistics had formed no part of the district court's exercise of its discretion on that issue. In that context, the fact that USIA had not addressed "the civil service/foreign service difficulty" with respect to the statistics (or otherwise) simply cannot be taken as a waiver of any or all claims of error with respect to the use of statistics for class certification. And in any event, USIA's objection to the use of statistics for certification goes well beyond the civil service/foreign service distinction, since our position is that statistics alone cannot demonstrate the commonality and typicality necessary for Rule 23.[4]

2. Respondents argue that the court of appeals correctly ruled that USIA waived its right to contest post-remand intervention by 20 new named plaintiffs and class representatives because USIA had not challenged those plaintiffs' lack of exhaustion of their

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[4] The court of appeals suggested that its prior qualms about the use of statistics were based largely on its concern about the blurring of foreign-service and civil-service positions in the plaintiff class. Pet. App. 9a. Even if that concern did in large part animate the previous panel's concern about statistics, that point hardly leads to the conclusion that it could constitute the *only* possible basis on which USIA might ever challenge the use of statistics to support class certification. The district court faithfully heeded what it took to be the prior panel's directive not to rely on statistics. Had the district court suggested that it might rely on statistics, USIA could have placed all its objections to the use of the statistics in this case on the record and raised those objections on appeal as well.

administrative remedies *before* they moved to intervene. Br. in Opp. 22. Respondents suggest that, even before the prior appeal, USIA knew the names and claims of all class members (*ibid.*), and so (presumably) USIA could have raised some unspecified objection to participation by class members who had not exhausted their remedies, and who had not yet sought to intervene. That suggestion is incorrect.

The names and claims of the intervenors became significant to the conduct of the class action only after the court of appeals' remand for further class-action proceedings. Apparently concerned that the evidence of typicality thus far placed in the record was weak, respondents brought forward new class representatives to bolster their chance of surviving scrutiny under Rule 23(a). If USIA had successfully challenged those class representatives as proper plaintiffs on the ground that they had not exhausted their administrative remedies, USIA would have been better situated to persuade the district court or the court of appeals that the original named representatives' claims were not typical of those of the class as a whole, and that the class should have been decertified.

Under the court of appeals' waiver rule, however, USIA presumably should have examined every unnamed class member's claim at the earliest possible stage to see whether those claims had been exhausted, and should have raised a challenge to every nonexhausted individual's status as a class *member* at that time—because of the remote possibility that, at some later point, any one of those class members might seek to become a class representative and named plaintiff. That holding, if left unreviewed, would be greatly burdensome to both plaintiffs and defendants in class actions; in this case, for example,

there are about 1100 unnamed class member claimants whose records would have to be examined in detail.[5] Nor is such a rule consistent with standard principles of class-action law. The intervenors' suitability as class members is not the same issue as their suitability as class representatives. If the intervenors here failed to exhaust their administrative remedies and have no legally sufficient excuse for that failure, then they are not appropriate class representatives, and USIA should have the right to challenge their intervention as named plaintiffs and representatives, whether or not they might remain as absent members of the class.[6]

Respondents also suggest that USIA's challenge to the intervention is academic because the court of

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[5] Of those 1100 class members, 19 have had their claims reviewed by a Special Master appointed by the district court. The Special Master has issued final reports in 14 of those cases, and has ruled in favor of the claimants in 12 cases. The average back pay award to each successful claimant thus far is approximately $518,000. Appeals from those awards are pending in the district court.

[6] For a variety of reasons, a class-action defendant might not challenge absent class members' status as class *members* based on their failure to exhaust remedies during the liability stage of the litigation. In cases like this one, there might be other members of the class who did exhaust their remedies, or who would be entitled to the benefit of the vicarious exhaustion rule of *Foster* v. *Gueory*, 655 F.2d 1319 (D.C. Cir. 1981), and who therefore were proper class members. Thus, there might be little point in contesting some individuals' membership in the class if numerous other members would remain in the class anyway. The class-action defendant might, however, challenge nonexhausting class members' right to relief at the remedial stage. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977).

appeals upheld the district court's decision to certify the class even without the evidence brought forward by those intervenors. Br. in Opp. 24. As we have explained, however, we believe that the district court's initial certification of the class action in 1978 was error, and USIA has consistently challenged that certification. The court of appeals did *not* affirm the district court's initial certification decision based on the evidence before the district court in 1978; rather, it affirmed certification based on the statistical evidence. The court of appeals has not yet considered USIA's contention that the district court's basis for the certification in 1978 was erroneous. If, however, this Court reverses the court of appeals' reliance on the statistical evidence to uphold the certification, and if this Court rules that USIA did not waive its right to contest intervention by the new named plaintiffs, then USIA will finally be able to present all of its challenges to the class certification to the court of appeals. USIA will be able to argue, for example, that the evidence before the district court in 1978 was not sufficient to support class certification, that the district court should not have considered the evidence brought forward by the intervenors (since they may not be proper class representatives), and that, even with some or all of the intervenors' additional evidence, class certification was not proper. Thus far, however, the court of appeals has not given USIA a hearing on any of those arguments.

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For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

MAY 1997